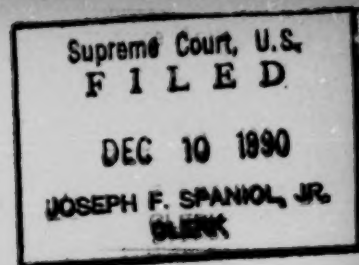


90-900



No. 90-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE
VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

—against—

THE CITY OF NEW YORK AND
THE LANDMARKS PRESERVATION COMMISSION OF
THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether *Employment Division v. Smith*, 110 S.Ct. 1595 (1990), may be extended to uphold a landmarks preservation law against a First Amendment challenge where:
 - (a) the law is applied selectively and has a disproportionate impact on religious organizations;
 - (b) the law provides a system of individualized exemptions that excludes consideration of religious hardship; and
 - (c) application of the law gives rise to a "hybrid" case that also involves the constitutional protection provided by the takings clause of the Fifth Amendment?
2. Whether the court of appeals applied an erroneous constitutional standard in holding that, although the application of a landmarks preservation law to petitioner "drastically restricted" petitioner's ability to generate revenue to support its religious mission, no infringement of petitioner's First Amendment rights could be found absent proof that petitioner "cannot continue its religious practice in its existing facilities?"
3. Whether the court of appeals erred in requiring petitioner to show, in order to establish a taking under the Fifth Amendment, that it "cannot continue its existing charitable and religious activities in its current facilities," even though application of the landmarks preservation law had destroyed more than eighty percent of the total value of petitioner's property?

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**THE RECTOR, WARDENS AND MEMBERS OF THE
VESTRY OF ST. BARTHOLOMEW'S CHURCH,**

Petitioner,

v.

**THE CITY OF NEW YORK AND
THE LANDMARKS PRESERVATION COMMISSION OF
THE CITY OF NEW YORK,**

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioner respectfully requests that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, in *St. Bartholomew's Church v. City of New York*, 2d Cir. No. 90-7101 (Sept. 12, 1990).

OPINIONS BELOW

The opinion of the court of appeals is reported at 914 F.2d 348 (2d Cir. 1990). The district court opinion is reported at 728 F. Supp. 958 (S.D.N.Y. 1989).¹

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1990. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action arises under the First, Fifth and Fourteenth Amendments to the Constitution and 42 U.S.C. § 1983 and involves the Landmarks Law of New York City, New York City Administrative Code §§ 25-301 to 25-321 (1996) ("Landmarks Law"). (61a - 99a).

STATEMENT OF THE CASE

This case concerns the burdens imposed by the Landmarks Law on churches and other religious organizations generally and, in particular, upon petitioner, The Rector, Wardens and Members of the Vestry of St. Bartholomew's Church ("St. Bartholomew's" or the "Church").

In this case, the application of the Landmarks Law has prevented petitioner from developing a portion of its property to support its religious mission. Specifically, petitioner seeks to

1. The opinion of the court of appeals is reprinted at pages 1a - 24a of the appendix to this brief. The district court opinion is reprinted at pages 25a - 57a of the appendix to this brief. The appendix in the court of appeals is cited as "(A. ____)." The appendix in the district court is cited by volume/page; for example, 10/3271 refers to volume 10, page 3271 of the district court appendix.

demolish the community house adjacent to its church building and erect a new building. The lower floors of the new building would provide space for various church activities. The upper floors would generate income that petitioner believes is essential to support its mission, to repair and rehabilitate the church building and, indeed, to assure its survival. The application of the Landmarks Law has destroyed ninety percent of the value of the community house site and eighty percent of the value of the entire property and has deprived the Church of the ability to use any of that value in support of its mission. In addition, the Church has been left with a facility that provides insufficient space and is in need of major repair and rehabilitation.

1. The Landmarks Law and Religious Organizations.

The Landmarks Law permits the designation as a landmark of any 30 year old building determined by the Landmarks Preservation Commission ("the Commission") to have "a special character." Landmarks Law § 25-302 n., (66a).²

As of 1986, approximately 600 buildings in New York City had been individually landmarked, and of that number 95 were churches or other religious buildings. (A. 188). Each of the churches whose property has been landmarked must, under criminal penalty, maintain the landmarked appearance of that property and cannot make *any* alteration or modification to the exterior without the permission of the Commission. Landmarks Law §§ 25-305, 25-317, (74a - 76a, 95a - 96a).

If a church seeks to alter its property it must first apply for a "certificate of appropriateness" that will be granted or denied by the Commission on the basis of its aesthetic judgment. Landmarks Law §§ 25-307 a., 25-307 d., (77a, 79a). If a certificate of appropriateness is denied, the church

2. The Landmarks Law also authorizes the designation of historic districts but such designations are not at issue in this action.

may then apply to the Commission for a "certificate of appropriateness on the ground of insufficient return."

2. The Landmarks Law and St. Bartholomew's.

St. Bartholomew's was organized as a Protestant Episcopal Church in 1835. The Church constructed buildings on its current site, at the corner of Park Avenue and 50th Street, in 1918. The buildings originally consisted of the church building and a small parish house. In 1927, the parish house was demolished and the present community house was constructed. (10/3271-73).

On March 16, 1967, the Commission issued a report designating the church building and the community house a landmark. (A. 596-97). Although the designation report of the Commission detailed the many beautiful architectural features of the church that formed the basis for designation, it did not ascribe any distinctive architectural features to the community house.

In December, 1983, the Church applied for a certificate of appropriateness to construct a 59 story building on the site of the community house. By letter dated June 21, 1984, the Commission criticized the design of the proposed building and denied the Church's application. (A. 598-603).

3. To obtain such certificate, a church (or other tax exempt owner) must establish, *inter alia*, that the property, if it were not tax exempt, would be incapable of earning a reasonable return and that the property is no longer "adequate, suitable or appropriate" for its charitable purposes. Landmarks Law §§ 25-309 a.(1)(a), (80a). In addition to the statutory test, the New York Courts have developed as a "judicial test" an alternative standard for relief applicable to charitable institutions including churches: *i.e.*, that a landmark designation is permitted "only so long as it does not physically or financially prevent, or seriously interfere with the carrying out of the charitable purpose." *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 455, 415 N.E.2d 922, 925 (1980).

In December, 1984, the Church made a second application for a certificate of appropriateness. It was based upon a complete redesign of the proposed building to meet the aesthetic objections of the Commission to the first building.⁴ Nevertheless, the Commission rejected the redesigned building. (A. 604-07).

In September, 1985, the Church applied for relief on the ground of "insufficient return." The Church presented evidence that the space in the community house is inadequate to accommodate the current needs of the Church's programs, and that both the church building and the community house suffer from serious physical deterioration. (E.g., A. 506-29, 635-72). An expert witness for the Church estimated that the cost of the essential repair and rehabilitation work needed to permit both buildings to function safely and adequately would exceed \$11 million. (A. 644-47).

The Church also established that the major portion of the value of its property lay in its development value. When the Landmarks Law destroyed that value, it reduced the total value of the Church's property by more than eighty percent. Specifically, a report and testimony of an appraisal firm placed the value of the entire landmark site, if not landmarked, at \$175,000,000, and as landmarked at \$35,000,000. The value of the community house site alone, if not landmarked, was found to be \$125,000,000, and as landmarked, \$15,000,000. (A. 608-09).

On February 24-25, 1986, the Commission passed resolutions denying the Church's application. The resolutions were based, in principal part, upon estimates of repair and

4. The redesigned building reflected a twenty percent reduction in space available for the community house and a fifty-two per cent reduction in the space to be leased as commercial offices. (A. 482-83). In addition, the materials and texture of the proposed building had been changed from reflective glass to limestone and brick in order to harmonize with the church building. (A. 456-78, 1118).

rehabilitation introduced at Executive Sessions of the Commission to which the Church had requested — and been denied — an opportunity to respond. (A. 407-48, 764-69). Such estimates totaled approximately \$3 million.

This action was commenced in April, 1986. The complaint challenged the constitutionality of the Landmarks Law as applied to St. Bartholomew's and the facial validity of the law as applied to religious organizations generally. Federal claims were asserted under the First, Fifth and Fourteenth Amendments and 42 U.S.C. § 1983.

The district court upheld the facial validity of the Landmarks Law as applied to religious organizations generally. The court also rejected the Church's claims that the application of that law to St. Bartholomew's had violated its rights under the First and Fifth Amendments as incorporated by the Fourteenth Amendment. The latter claims were denied on the grounds that the Church had failed to prove that "it can no longer conduct its charitable activities or carry out its religious mission in its existing facilities." (57a).

The court of appeals affirmed. Without considering the impact of the law on religious organizations generally, it approved the standard applied by the district court with respect to St. Bartholomew's and the finding that the Church had failed to meet that standard.

REASONS FOR GRANTING THE WRIT

" [The court of appeals decision] is a total affirmation, really, of our powers," said Laurie Beckelman, chairwoman of the city's Landmarks Preservation Commission. She said the court was affirming "the absolute power" of the commission "to designate and regulate religious properties as landmarks." *The New York Times*, Sec. B, p. 4, col. 2, September 13, 1990.

* * *

The power of landmark preservation commissions to appropriate religious property has become a painful reality to religious organizations throughout the country. As neighborhoods change, congregations, once-thriving but now diminished, are often left with buildings that are ill-suited to their needs and costly to maintain and repair. When those buildings have been landmarked, the capacity of a church to plot a course for survival is seriously threatened. If the church seeks to modify such a building — to serve the changing needs of its congregation — it will quickly discover that its destiny rests in the hands of a secular agency whose priorities are altogether different and whose discretion is virtually unfettered.

Against this background, the present case raises issues of broad significance in two areas of constitutional jurisprudence: the free exercise clause of the First Amendment and the takings clause of the Fifth Amendment. Although the free exercise clause and the takings clause implicate quite different values, the court of appeals rejected petitioner's claims under each clause by application of the same simplistic formula — that no constitutional violation has occurred so long as petitioner has not been prevented from carrying on its existing activities in its current facilities. That standard has no basis in the precedents of this Court and conflicts with decisions of the highest courts of the states of Washington and New York.

Free Exercise. In rejecting petitioner's free exercise claims, the court of appeals ignored the effect of the Landmarks Law on religious organizations generally and looked only to the impact on petitioner. The court then proceeded to create a standard that denies petitioner the ability to adapt its property to a use compelled by the religious convictions of its congregation. The decision of the court of appeals and the standard it applied were clearly in conflict with the recent decision of the Supreme Court of Washington in *First Covenant Church v. City of Seattle*, 114 Wash.2d 392, 787 P.2d 1352 (1990) which had

found the landmarking of a church to be a violation of the free exercise clause.⁵

The decision by the court of appeals herein did not discuss, or even cite, *First Covenant*. Rather, the court relied principally on this Court's decision in *Employment Division v. Smith*, ___ U.S. ___, 110 S.Ct. 1595 (1990), which held that requiring compliance with a neutral and generally applicable criminal law did not infringe the free exercise clause. The most basic error of the court of appeals was to conclude that the Landmarks Law is a "generally applicable" law within the meaning of *Smith*. Moreover, the court failed to consider the two major exceptions to the applicability of *Smith* that were explicitly recognized in that case: (a) cases arising under laws that provide systems of individualized exemptions but exclude (as the Landmarks Law does) consideration of religious hardship; and (b) "hybrid" cases wherein a free exercise claim is joined with a claim of other constitutional rights, in this case petitioner's rights as a property owner under the Fifth Amendment.⁶ In short, the decision below represents a broad and unwarranted expansion of *Smith* that this Court should correct.

Takings. Petitioner's takings claim presents an important question not previously addressed by this Court: the standard to be applied in determining whether a regulation that affects the property of a charitable or religious institution constitutes a taking. We submit that, while the takings analysis may differ in some particulars, a charitable or religious property

5. The landmarking of a church was also invalidated on First Amendment grounds in *Society of Jesus of New England et al. v. Boston Landmarks*, Suffolk Co. of Mass., appeal docketed No. 5415 (Sup. Jud. Ct. Mass. June 22, 1990).

6. Subsequent to *Smith*, a motion for reconsideration was filed in *First Covenant* and was denied by the Supreme Court of Washington on September 12, 1990.

owner is surely entitled to no less protection under the Fifth Amendment than a commercial owner. Such protection, however, was plainly denied under the standard applied by the court of appeals.

In denying petitioner's claim under the takings clause, the court of appeals applied a redacted, and seriously distorted, version of the constitutional test adopted by the New York Court of Appeals for assessing the validity of the Landmarks Law as applied to charitable institutions. *See Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922 (1980). In support of the standard it created, the court of appeals cited only one decision of this Court, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) — which was decided twelve years ago by a divided court. Although the decision was heavily fact-dependent — and the facts were, in important respects, quite untypical — it has been frequently misunderstood as a broad charter for any and all landmarking.⁷ Thus, in the present case, the courts below viewed *Penn Central* as dispositive, with little heed to the striking dissimilarity of its facts. The result was a decision that is, in principle, contrary to *Penn Central* or, at best, a major and unwarranted extension of that case. Such a result is particularly troublesome in light of subsequent decisions of this Court that suggest a limitation — and not an expansion — of the reach of *Penn Central*.

A decision that permits landmarking to destroy, without compensation, more than eighty percent of the value of a property will have a major impact. Indeed, if the decision is permitted to stand, it will be seen as a clear signal that few if any constraints to landmarking are posed by the takings clause. The decision of the court of appeals, therefore, will have serious implications, not only for religious organizations, but for all

7. See, e.g., Marcus, *The Grand Slam Grand Central Terminal Decision: A. Euclid for Landmarks, Favorable Notice for TDR And a Resolution of the Regulatory/Taking Impasse*, 7 Ecology Law Quarterly 731 (1979).

owners of landmarked buildings. Such a decision clearly merits a review by this Court.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE DENIAL OF PETITIONER'S FIRST AMENDMENT CLAIMS.

A. The Court of Appeals Erred In Its Application Of *Employment Division v. Smith*.

Prior to its recent decision in *Employment Division v. Smith*, this Court had repeatedly held that a regulation imposing a substantial burden on the free exercise of religion could not be justified merely because the regulation appeared to be "neutral on its face." Such a burden, the Court had indicated, could only be justified by the showing of a "compelling governmental interest." *Jimmy Swaggart Ministries v. Board of Equalization*, ___ U.S. ___, 110 S.Ct. 688 (1990); *Hernandez v. Commissioner*, ___ U.S. ___, 109 S.Ct. 2136 (1989); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Smith*, however, the Court held that the compelling interest test was inapplicable to "an across-the-board criminal prohibition on a particular form of conduct." ___ U.S. at ___, 110 S.Ct. at 1603.

The Landmarks Law, with its aesthetic concerns and wholly discretionary applications, is hardly analogous to "an across-the-board criminal prohibition" or the "socially harmful conduct" addressed in *Smith*. Accordingly, the holding of *Smith* does not govern the present case. Indeed, even if *Smith* is read more broadly, to apply to any law that is "neutral" and "generally applicable," it is clear that the Landmarks Law is not such a regulation.

The Landmarks Law appears on its face to be neutral, *i.e.*, it makes no reference to religion or religious buildings except to provide an exemption for the interiors of places of worship. Landmarks Law § 25-303 a. (2), (70a). On the other hand, the provisions that authorize the landmarking of

individual buildings are not "generally applicable" in any meaningful sense of the term. The essence of the New York law — and any landmarks law — is selectivity. For example, to be landmarked pursuant to the New York law, a building must be determined to have "a special character or special historical or aesthetic interest or value." Landmarks Law § 25-302 n., (66a). By its nature, such landmarking will be applied to relatively few buildings.

The lack of general applicability is further manifested by the fact that the law has been applied disproportionately to religious buildings. Of approximately 600 individually landmarked buildings in New York City in 1986, 95 were religious buildings. Moreover, the impact of the law falls even more disproportionately upon those denominations for whom the beauty of their church buildings has been an important way to express religious belief: one third of the landmarked religious buildings are Episcopal churches. (A. 165-70).

The nature of the Landmarks Law is similar, in significant respects, to the flat licensing taxes invalidated in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Follett v. McCormick*, 321 U.S. 573 (1944). Like the Landmarks Law, such taxes were "neutral", i.e., they did not single out, or make any reference to, religious organizations. Nevertheless, they were found to place an unconstitutional burden on the free exercise of religion and this Court has emphasized the difference between such taxes and a "generally applicable sales tax." See *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 587 n.9 (1983); *Jimmy Swaggart Ministries v. Bd. of Equalization*, ___ U.S. at ___, 110 S.Ct. at 694-695.

In *Swaggart* and *Minneapolis Star*, the Court pointed out that the license taxes invalidated in *Murdock* and *Follett* had imposed a prior restraint on the exercise of a constitutionally protected right. That observation is equally applicable to the Landmarks Law — which operates as a prior restraint on the exercise of religion by every church whose property has been landmarked. Compliance with the procedures of the Landmarks

Law is exacted as a precondition to any alteration of the church's own property — no matter how essential to the mission of the church. *See, infra*, pp. 15–16.

In addition to the court of appeals' failure to observe this Court's limitation of the holding in *Smith* to laws of general applicability, it also failed to acknowledge this Court's explicit recognition of two kinds of circumstances in which a compelling governmental interest was still required to justify burdens on free exercise rights. Although both of the circumstances identified in *Smith* are conspicuously present in the instant case, the court of appeals failed to address either.

First, *Smith* reaffirmed the principle that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason," ___ U.S. at ___, 110 S. Ct. at 1603, *cit*ing *Bowen v. Roy*, 476 U.S. 693, 708 (1986). In this case, it is clear that the Landmarks Law creates just such a "system of individual exemptions." Such a system is found in the statutory provisions for relief on the ground of "insufficient return" and in the judicial test formulated by the New York courts. *See, e.g., Society for Ethical Culture v. Spatt, supra*. It is equally clear that neither the statutory nor the judicial provisions for relief encompass any consideration of religious hardship. Indeed, the New York Court of Appeals explicitly excluded consideration of any religious hardship on the mistaken assumption that a church's use of its property to support its mission is "secular." 51 N.Y.2d at 456. The Commission, for its part, applies the same exclusion. *See, infra* p. 20.

Second, *Smith* pointed out that even the application of a "neutral, generally applicable law to religiously related action" had been barred in "hybrid" cases involving "other constitutional protections." ___ U.S. at ___, 110 S.Ct. at 1601–02. Specifically, the Court referred to free exercise cases also involving freedom of expression or the right of parental supervision. So here, the application of the Landmarks Law to churches involves not only the free exercise of religion but the rights of those churches, as property owners, under the Fifth

Amendment. Indeed, the latter rights, unlike the right of parental supervision, do not arise merely by inference but are enumerated in the text of the constitution.

The erroneous application of *Smith* permitted the court of appeals to avoid the issue of whether any compelling state interest could be found to justify the burden of the Landmarks Law. It is evident, however, that no such interest exists. Recognition of aesthetics as a permissible state goal, as in *Penn Central*, is plainly not the equivalent of recognizing it to be a compelling state interest.⁸

The absence of any compelling state interest is glaringly obvious under the facts herein. The applications of St. Bartholomew's before the Commission did not seek authority to demolish or modify in any way the only building on the site of any architectural distinction, *i.e.*, the church building. Both plans submitted by the church preserved the church building, as well as a garden in front of the community house.

8. In *First Covenant Church v. City of Seattle*, *supra*, the Supreme Court of Washington carefully considered *Penn Central* and concluded:

The appellants [in *Penn Central*] did not allege any violation of a fundamental right. Absent such a claim, the Court was able to employ minimal scrutiny in its analysis of New York City's Landmarks Preservation Law. Although the Court held that the landmarks law satisfied the limited inquiry of minimal scrutiny, it seems most likely the Court would not have reached the same result had it analyzed the law under strict scrutiny.

We hold that the preservation of historical landmarks is not a compelling state interest. Balancing the right of free exercise with the aesthetic and community values associated with landmark preservation, we find that the latter is clearly outweighed by the constitutional protection of free exercise of religion and the public benefits associated with the practice of religious worship within the community. See *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 525, 496 N.E.2d 183, (1986) (Meyer, J., dissenting), *cert. denied*, 479 U.S. 985 (1986). 787 P.2d at 1361.

(A. 238-42, 245-49; A. 462-66, 470-77). In short, the government's interest, if discernible at all in this case, could not justify a gross interference with the freedom of St. Bartholomew's to make use of its own property in support of the religious work for which it was organized.

B. The Court of Appeals Erred In Disregarding the Impact Of The Landmarks Law on Religious Organizations Generally and In The Standard It Applied To Petitioner.

The court of appeals viewed petitioner's First Amendment claims through a very narrow lens. The court declined to address at all the impact of the Landmarks Law on religious organizations generally. And, in the case of petitioner, the court found no burden upon the free exercise of religion so long as petitioner is able to raise sufficient funds to permit it to carry on its existing activities — at some undefined level — in its present facilities. That is a standard, we believe, that disregards basic values of the First Amendment.

1. The Burdens Of The Landmarks Law On Religious Organizations Generally.

The Landmarks Law, on its face, imposes burdens on religious organizations that severely impact upon the free exercise of religion. As a threshold proposition, it is vitally important for a church to be able to devote its sanctuary and ancillary buildings to the support of the church's religious mission. And it is equally clear that the use of such buildings constitutes the exercise of religion, *i.e.*, it is conduct "rooted in religious belief." See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). If, however, the church site is landmarked, the ability of the church and its members to use the buildings on the site in accordance with the dictates of their faith is severely constrained.

If the church attempts to contest a proposed landmark designation, it will find that the applicable standard is exceedingly broad and exceedingly vague (*e.g.*, "special

character"). Landmarks Law § 25-302 n., (66a). In the courts below, respondents cited *Penn Central* to defend the vague and subjective standard of the Landmarks Law, but ignored the crucial point that *Penn Central* did not involve a First Amendment freedom.⁹

If a church is landmarked, the church, its clergy and members know that, under pain of criminal sanctions, their first priority must be not the funding of their programs in the practice of their religion, but preserving the landmark appearance of their buildings. Landmarks Law § 25-317, (95a - 96a). The church also knows that it can do *nothing* with respect to the exterior of its buildings without the permission of the Commission. The church's days of autonomy in the management of its affairs are over. As the Supreme Court of Washington pointed out in striking down the application of a similar ordinance to a church in Seattle:

9. Thus, while Justice Brennan, writing for the Court in *Penn Central*, was willing to accept the vagueness and subjectivity of the Landmarks Law in the context of a claim under the takings clause, he later made it clear that very different considerations apply where, as here, important First Amendment rights are directly implicated. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 821-22 (1984):

The fundamental problem in this kind of case is that a purely aesthetic state interest offered to justify a restriction on speech . . . creates difficulties for a reviewing court in fulfilling its obligation to ensure that government regulation does not trespass upon protections secured by the First Amendment. The source of those difficulties is the unavoidable subjectivity of aesthetic judgment — the fact that "beauty is in the eye of the beholder." As a consequence of this subjectivity, laws defended on aesthetic grounds raise problems for judicial review that are not presented by laws defended on more objective grounds — such as national security, public health, or public safety. In practice, therefore, the inherent subjectivity of aesthetic judgments makes it all too easy for the government to fashion its justification for a law in a manner that impairs the ability of a reviewing court meaningfully to make the required inquiries. Brennan, J. dissenting. *Id.*

The practical effect of the provisions is to require a religious organization to seek secular approval of matters potentially affecting the Church's practice of religion.

First Covenant Church v. City of Seattle, supra, 787 P.2d at 1359.

If a church seeks to alter its landmarked building, it must embark upon an administrative odyssey that is lengthy, expensive and lacking the most basic elements of procedural due process. First, the Landmarks Law requires the church to incur the expense of designing the proposed alteration without knowing what might or might not be accepted by the Commission. The design is then presented to the Commission with an application for a certificate of appropriateness that, like the initial designation, will be granted or denied solely on the basis of the aesthetic sensibilities of the eleven Commissioners. Landmarks Law § 25-307, (77a - 79a).

After a denial of a certificate of appropriateness, the church may then make an application on ground of "insufficient return". At this point, the church must submit to a broad and searching examination into its operations. *See infra* p. 20. Throughout that examination, the Landmarks Law fails to provide anything resembling an orderly procedure for the resolution of factual issues or even the right to respond to adverse evidence.¹⁰

The consequences of the foregoing are starkly apparent. To begin with, a church's loss of autonomy in the management of its affairs is, by itself, a matter of serious

10. The Landmarks Law requires a public hearing but explicitly provides that "the commission in determining any matter as to which such hearing is held, shall not be confined to consideration of the facts, views, testimony or evidence submitted at such hearing." Landmarks Law § 25-313 b., (93a). In the present case, petitioner requested, but was denied, the opportunity to respond to testimony that provided the core of the Commission's findings. *See, supra* pp. 5-6.

consequence. See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107-108 (1952) (legislation that regulates church administration, the operation of the churches, [and] the appointment of clergy . . . prohibits the free exercise of religion); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (National Labor Relations Board held not to have jurisdiction over church-operated schools)."

Important as it is, however, loss of church autonomy is by no means the only impact of the Landmarks Law upon the free exercise rights of religious institutions. The intent and the effect of the law is to place upon a church the "burdens of proof and persuasion" that the church is entitled to devote its own property to the support of its religious mission. The imposition of such burdens on the exercise of First Amendment rights is unacceptable. Cf. *First Unitarian Church v. Los Angeles*, 357 U.S. 545, 547 (1958); *Speiser v. Randall*, 357 U.S. 513, 529 (1958). Given the obscure standards and onerous procedures of the Landmarks Law, there are very few churches subject to the law that will have the fortitude and financial strength even to seek the relief that the law purports to provide. Thus, most churches will be required to forsake any steps to expand or maintain their religious missions that would involve a significant alteration of their facilities. The observation of *Speiser*, made in a different context, is nonetheless quite apt:

11. As one commentator has summed up the law, "Quite apart from whether a regulation requires a church or an individual believer to violate religious doctrine or felt moral duty, churches have a constitutionally protected interest in managing their own institutions free of government interference." Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1373 (1981). Professor Laycock's article was cited by Justice Brennan concurring in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), wherein the Court upheld the constitutionality of an exemption for religious organizations from a federal statute prohibiting religious discrimination in employment. 483 U.S. at 341. Justice Brennan further pointed out that "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." 483 U.S. at 342.

The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, *cf. Dennis v. United States, supra*, provide but shifting sands on which the litigant must maintain his position. 357 U.S. at 526.

In short, the vagueness and overbreadth of the standards for designation, coupled with the intrusive and cumbersome provisions for relief, inevitably create a chilling effect on the practice of religion by a landmarked church. *Cf. Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 956 (1984).

2. The Burden Of The Landmarks Law On St. Bartholomew's And The Erroneous Standard Applied By The Court Of Appeals.

The court of appeals acknowledged that "the Landmarks Law has drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs." (13a). Remarkably, however, the court found that fact to have no constitutional significance:

Nevertheless, we understand Supreme Court decisions to indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause. *See Jimmy Swaggart Ministries v. Board of Equalization*, ___ U.S. ___, 110 S.Ct. 688 (1990); *Hernandez v. Commissioner*, ___ U.S. ___, 109 S.Ct. 2136 (1989). (*Id.*)

That conclusion, we submit, clearly misapplies the holdings of *Hernandez* and *Swaggart*.

To begin with, both *Hernandez* and *Swaggart* involved "generally applicable" laws. For the reasons previously discussed, that characterization cannot be applied to the Landmarks Law. Second, the magnitude of the financial

burdens involved in *Hernandez* and *Swaggart* did not remotely approach that imposed by the Landmarks Law on St. Bartholomew's. Both cases involved the relatively minimal impact of an incrementally larger tax burden. The Court in *Swaggart*, moreover, expressly recognized that a quite different question would be presented by a "more onerous tax rate" that "might effectively choke off an adherent's religious practices." ____ U.S. at ____, 110 S.Ct. at 688.

The court of appeals apparently read *Swaggart* to mean that an economic burden is irrelevant unless the effect is to choke off religious practices *entirely*. So severe a standard is neither required nor justified by that case. Where, as here, a law is conceded to have the effect of "drastically restricting" the revenue available to support a church's mission, that fact should not be ignored on the grounds that the church may nevertheless be able to devise a method of surviving at some reduced level.

The court of appeals failed to recognize how directly the constraints of the Landmarks Law may coerce a church and prevent its congregation from acting in accord with their religious beliefs. Specifically, the resources of the church may be — as they most surely have been in this case — diverted from a use commanded by the religious faith of its members and appropriated to serve a secular purpose. In supporting the application of St. Bartholomew's before the Commission in this case, the then Bishop of the New York Diocese, Paul Moore, expressed it simply and clearly. After reviewing the parable of Judgment Day from Matthew 25 he said:

In this parable, as in the First Sermon, as in the Sermon on the Mount, as in the whole life and death upon the cross, Jesus Christ set compassion and justice at the very heart of our religion. Indeed, he said it is the basis on which we are ultimately judged.

Would you deny us our right to practice our religion? Would you deny us the means to pick up as best we can the burden of the poor that the public sector has so shamelessly laid down? Would you prevent us from

sheltering the homeless, feeding the hungry, caring for desperate children in a city which in these days has seemed to have lost its heart?

Under our polity all the churches and institutions of our diocese which serve the poor are dependent on churches like St. Bartholomew's. Denying a hardship petition today would be the denial of our right as Christians to carry out the very heart of our mission. (2/477-78).

That plea, however, fell on deaf ears. The Commission, citing *Ethical Culture*, ruled that the Church's desire to secure funds "to maintain its current ministry and to respond to the future demands of the City, while commendable and understandable, cannot be the basis for establishing a showing of hardship" (7/2459). The court of appeals was similarly unmoved. The standard it applied excluded from consideration all but the most extreme form of religious hardship, *i.e.*, inability to continue. So broad a disregard of religious hardship, however, cannot be justified in the absence of some compelling state interest. And here, we repeat, there is none.

Finally, the court of appeals brushed aside, in a footnote, the entanglement between church and state spawned by the Landmarks Law:

The only scrutiny of the Church occurred in the proceedings for a certificate of appropriateness, and the matters scrutinized were exclusively financial and architectural. This degree of interaction does not rise to the level of unconstitutional entanglement. (14a).

That depiction of the operation of the Landmarks Law totally misapprehends the reality of proceedings before the Commission. What the court of appeals failed to appreciate is that the purported scrutiny of matters "financial and

architectural" leads inexorably into the details of virtually every facet of a church's operations, priorities and motivations.¹²

Such issues and such proceedings bear no resemblance to the routine administrative and recordkeeping obligations involved in *Jimmy Swaggart Ministries*. Indeed, they represent a breadth and depth of entanglement that is unparalleled in any reported case. It is, we submit, unique and unacceptable.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE DENIAL OF PETITIONER'S CLAIM UNDER THE FIFTH AMENDMENT.

The court of appeals also applied its free exercise standard to petitioner's claim under the takings clause of the Fifth Amendment. Specifically, the court rejected the takings claim because it believed that petitioner is able to conduct its existing charitable and religious activities in the present facilities. That standard, however, is inconsistent with the only authority of this Court cited by the court of appeals, *Penn Central Transportation Company v. New York City, supra*. It also conflicts with subsequent decisions of this Court and with the constitutional test adopted by the New York Court of Appeals with respect to the landmarking of buildings owned by charitable institutions.

12. The record below abundantly illustrates that fact. For example, in the hearings before the Commission, the Church was called upon to address such issues as: the decision to close the church sanctuary to the public on weekdays, the size of the Rector's apartment, the number and level of compensation of the clergy employed by the church, the manner (and propriety) of providing of food and shelter to the homeless, the managerial expertise of the Vestry, and how and for what purposes the Church's fundraising capacity should be employed. (2/598, 604-606, 639-40; 3/1032-38; 4/1144-45, 1159-61, 1163-84, 1276-77).

1. The *Penn Central* Analysis.

In *Penn Central*, the Landmarks Law had been applied to prevent the erection of a tower above Grand Central Terminal. The decision of the Court upholding that application turned upon its assessment of the "severity of the impact of the law on [Penn Central's] parcel" 438 U.S. at 136. Addressing that issue, the majority noted that the Landmarks Law did not interfere with the existing use of the property as a railroad terminal. Upon making that observation, however, the Court immediately pointed out that "[m]ore importantly" the record showed that Penn Central not only received a profit on the Terminal but "a 'reasonable return' on its investment." *Id.*

The majority then found that the impact of the law was mitigated by two factors indicating that Penn Central had not in fact lost all or most of its development rights, *i.e.*, the air rights above the Terminal. First, the Court pointed out that after the initial rejection, Penn Central had not proposed an alternate design and suggested that the Commission might approve a smaller building. Second, the Court pointed out that the air rights above the Terminal could be transferred to various buildings owned by Penn Central that were adjacent to the Terminal and, therefore, eligible to receive a transfer of such air rights. 438 U.S. at 137.

In the present case, the court of appeals sustained the finding of the district court that petitioner was able to continue to use the community house and held that fact to be dispositive. The key factors in the *Penn Central* analysis were dismissed as irrelevant or brushed aside in conclusory terms. By that process, we submit, the court of appeals lost sight of the meaning of *Penn Central*.

To begin with, the basic premise of the court of appeals — continued use of the property — rests upon an analysis wholly unlike anything found in *Penn Central*. Specifically, the premise rests upon an assessment of the adequacy of the property, the cost of addressing its deficiencies *and* the ability of petitioner to bear that cost.

With respect to the cost of repair and rehabilitation, petitioner had pointed out various errors in the \$3 million estimate accepted by the district court, including the total omission of \$1.5 million of work. The court of appeals, however, held that "even if the potential cost of repair totaled \$4.5 million, the Church has not adequately demonstrated that it is unable to meet this expense." (20a - 21a).

That conclusion of the court of appeals rested upon a seriously distorted view of the petitioner's financial condition. More importantly, however, the court's focus on the financial capacity of the Church represented a significant departure from the analysis of *Penn Central*. The effect of that focus is to make the fact of a taking turn not on the severity of the impact of the law on "the parcel," as in *Penn Central*, but upon the financial resources of the person or entity who happens to own the parcel. Such a mode of analysis finds no support in the decisions of this Court or concepts of basic fairness.

The court of appeals further departed from *Penn Central* in disregarding the factor of "reasonable return". In this case, it was demonstrated beyond serious argument that, if the Church's community house were devoted to commercial purposes, it would *not* yield a reasonable return.¹³ The court of appeals, however, dismissed that fact as "irrelevant" on the grounds that the existing use of the community house was for charitable rather than commercial purposes. In lieu of a "reasonable return" the court of appeals simply referred once again to the posited continued use of the community house by petitioner. The court, however, ignored the fact that continued

13. The court of appeals indicated that "the use of the Community House would yield an estimated return of only six percent." (17a). In fact, the record showed that it would yield a return of *less than six percent of assessed valuation*. (A. 490). As the New York Court of Appeals has made clear, assessed valuation is not a proper basis on which to determine reasonable return. *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 114 n. 13, 542 N.E.2d 1059, 1070 n. 13, *cert. denied sub nom. Wilkerson v. Seawall Associates*, ___ U.S. ___, 110 S.Ct. 500 (1989).

use alone had not been deemed sufficient in *Penn Central*. On the contrary, as we have shown, this Court had found it to be more important that Penn Central was able to derive a reasonable return from such use.

The inability of a charitable owner to derive a reasonable return from a landmarked site may not, by itself, be dispositive. Such inability, however, makes it even more important to determine whether the impact of the Landmarks Law is mitigated by any other factor. Here it is not and the severity of that impact — destroying more than eighty percent of the value of “the parcel” — remains wholly unmitigated.

In *Penn Central*, the Court questioned whether Penn Central had lost all of the value of the air rights above the Terminal since the Commission had not ruled out the possibility of approving an alternative design for a smaller building. In this case, the court of appeals sought to apply that analysis to petitioner, but the facts herein do not fit. In this case, petitioner did precisely what this Court had suggested in *Penn Central* — after its first application was rejected, it returned with a second proposal specifically designed to respond to the Commission's objections to the first application and proposing a significantly smaller building.

Nevertheless, the court of appeals attempted to draw a parallel with *Penn Central*, stating that respondent had “invited appellant to propose an addition to the Community House in the instant matter.” (17a). In fact, however, the only “addition” that respondent ever indicated it might accept was a two-story expansion. (A. 825-27, A. 839-40). Such an addition might alleviate some of petitioner's space problems, but it would generate no revenue to recover the cost of the expansion, let alone any funds for support of petitioner's mission or for repair and rehabilitation of the church and community house.

The present case also differs from *Penn Central* in that petitioner has no feasible means of transferring its development rights to another site. As this Court noted in *Penn Central*, air rights are transferable only to a contiguous site, *i.e.*, across the

street or across an intersection. 438 U.S. at 113-14. Petitioner, unlike *Penn Central*, owns no other properties to which its air rights could be transferred and has no other prospects for such a transfer. (A. 388-95). Thus, although the court of appeals suggested that petitioner's rights are not "worthless," it is clear that such rights have no immediate value and that their possible value at some future time is, at best, wholly speculative. If that does not make petitioner's development rights "worthless," it comes very close indeed.

2. The Cases Subsequent to *Penn Central*.

While *Penn Central* is the only decision of this Court involving the Landmarks Law, or landmarking in general, it is by no means the only decision relevant to the issues herein. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), as in *Penn Central*, the Court rejected a claim under the takings clause. The analysis of the Court in *Keystone*, however, clearly supports St. Bartholomew's claims.

(a) The nature of the State interest and "reciprocity of advantage". In *Keystone*, the Court rejected a challenge to the facial validity of a law prohibiting the mining of certain coal to prevent the subsidence of the surface estate. The law appeared to be similar in purpose and effect to a law that the Court had invalidated in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). In *Keystone*, however, the Court distinguished the later statute on the ground that it was more clearly designed to protect important public interests. The Court emphasized that "the nature of the State's action is critical in takings analysis" and cited the numerous takings cases that had involved a "noxious use" or some use of property analogous to a common law nuisance. The Court also gave renewed importance to the concept of "reciprocity of advantage" that was first articulated by Justice Holmes in *Pennsylvania Coal* and had been stressed by then Justice Rehnquist, dissenting in *Penn Central*, 438 U.S. at 144-50.

In sustaining the facial validity of the Landmarks Law in *Penn Central*, the Court had, by footnote, appeared to

minimize the importance of whether the challenged regulation sought to restrain a "noxious" use 438 U.S. at 133-34, n. 30. The decision in *Keystone*, however, restored that factor to the forefront of takings analysis. That is not to say, and we do not urge, that a regulation is necessarily invalid if it is not addressed to a noxious use or some analogous condition. Thus, we do not seek to overturn the determination in *Penn Central* that the Landmarks Law is facially valid. Nevertheless, when a particular application of that law is challenged, the nature of the law — and hence the nature of the government's interest — remains highly relevant.

In the present case, the governmental interest is remarkably weak. As previously shown, the proposed development would leave the church building unimpaired. *See, supra*, p.13. Moreover, development of the community house site would provide the funds that are desperately needed to restore and preserve the church building.¹⁴

Similarly, the absence of any reciprocity of advantage enjoyed by petitioner is striking. A landowner who is burdened by the restrictions of a zoning law or a historic district receives the benefit of the same restrictions being applied to adjacent landowners. *See Penn Central, supra*, 438 U.S. at 147, Rehnquist, J., dissenting. Where individual buildings are landmarked, however, any benefit to the owner from the landmarking of other buildings is attenuated at best. Indeed, this case stands any concept of a reciprocity of advantage on its head.

14. Indeed, the application of the Landmarks Law in the present case fails to meet the fundamental requirement of substantially advancing a legitimate state interest. *See Nollan v. California Coastal Comm.*, 483 U.S. 825, 834-35 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Nectow v. Cambridge*, 277 U.S. 183 (1928). The court of appeals held that the governmental interest identified in *Penn Central* was "equally applicable" in the present case but made no attempt to support that conclusion with any analysis of the impact of the proposed building.

When St. Bartholomew's was built in 1918, and for many years thereafter, Park Avenue was zoned for residential use. The Church shared with its neighbors the benefits and limitations of that designation. The zoning law, however, was subsequently changed to permit commercial development. After World War II, commercial development blossomed and, ultimately, became all encompassing. While the City realized millions of dollars in tax revenues from that development, it resulted in the displacement of the Church's neighborhood congregation and the concomitant weakening of its financial viability. (A. 209; A. 375). Ironically, the City now seeks to prevent petitioner from adapting to the very environment the City itself created.

(b) The value of the property taken. *Keystone* made it clear that the test for a regulatory taking *requires* a court to consider the value taken from the property. 480 U.S. at 497. In this case, viewing the Church's property as a whole, the value taken from the property is \$140 million, while the value remaining is \$35 million. The court of appeals acknowledged that a large value had been taken from the property: "In this particular case, the revenues are very large because the Community House is on land that would be extremely valuable if put to commercial use." (13a). Contrary to the command of *Keystone*, however, the court of appeals proceeded to ignore that value — holding that the *only* fact to be considered was the Church's continued ability to use the property.

Following *Keystone*, this Court upheld takings claims in two cases decided the same term. *Hodel v. Irving*, 481 U.S. 704 (1987) held that a taking was effected by a law that prohibited the devise of fractional shares of Indian lands. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), found a taking in the required grant of an easement across the owner's property. More recently, in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, cert. denied sub nom. *Wilkerson v. Seawall Associates*, ___ U.S. ___, 110 S.Ct. 500 (1989), the New York Court of

Appeals provided a careful analysis of the decisions in *Penn Central*, *Keystone*, *Hodel* and *Nollan*.

In *Seawall*, the court struck down the City's law regulating single-room occupancy properties on the ground, *inter alia*, that it destroyed the right to develop such properties. The court noted that in *Penn Central* and *Keystone*, the Supreme Court had held, under the facts of those cases, that the partial loss of development rights did not constitute a taking. On the other hand, the court observed, *Hodel* and *Nollan* had each found a taking in the total loss of a single element of property value.

The *Seawall* opinion suggested that decisions in the later cases, *Hodel* and *Nollan*, had moved toward acceptance of the theory of "conceptual severance," [i.e., assessing only the value of the rights taken without regard to its relationship to the value of the whole property]". 74 N.Y. 2d at 110, 542 N.E. 2d at 1067. Under the facts of *Seawall*, however, the court found the loss of development rights to be a taking under either approach:

By any criterion — whether the property rights abolished or impaired are considered alone, as in *Hodel* and *Nollan*, or the values of these rights are compared with the values of the properties as a whole, as in *Penn Central* and *Keystone* — the conclusion is inescapable that the effect of the [law] is unconstitutionally to deprive owners of economically viable use of their properties. 74 N.Y.2d at 110, 542 N.E.2d at 1068.

So here, the property rights appropriated by the Landmarks Law may be considered alone or in comparison to the value of the property as a whole. In either event, the fact of a taking is inescapable. What is not permissible, we submit, is the course taken by the court of appeals — to simply disregard the value of the property taken.

3. Conflict With the New York Court of Appeals.

As shown in the preceding section, the decision of the court of appeals herein is fundamentally at odds with the analysis of the New York Court of Appeals in *Seawall Associates*. In addition, the decision is also in conflict with the constitutional standard adopted by that court with respect to the application of the Landmarks Law to charitable institutions.

Specifically, as we have earlier noted, the standard adopted by the New York Court of Appeals is to determine whether landmark designation "physically or financially prevent[s] or seriously interferes with the carrying out of the charitable purpose" (emphasis added). *Society for Ethical Culture v. Spatt*, 51 N.Y.2d at 455, 415 N.E.2d at 925 (1980). Both the district court and the court of appeals cited *Ethical Culture* with apparent approval. Yet, both courts proceeded to apply a drastic – but wholly unexplained – redaction of the *Ethical Culture* test. Specifically, both courts transformed the test into a requirement of proof that petitioner "can no longer carry out" its charitable purposes. Thus, they distorted the test by excising the key phrase "or seriously interferes with." As a result, the test applied below is one that is in clear conflict with the decisions of the New York Court of Appeals. It is a test, we submit, that this Court should decisively reject.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Dated: December 10, 1990

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APPENDIX

**The RECTOR, WARDENS, AND MEMBERS
OF THE VESTRY OF ST. BARTHOLOMEW'S
CHURCH, Plaintiff-Appellee (Re: 88-7751),
Plaintiff-Appellant (Re: 90-7101),**

v.

**The CITY OF NEW YORK AND THE
LANDMARKS PRESERVATION
COMMISSION OF THE CITY OF NEW YORK,
Defendants-Appellees (Re: 88-7751, 90-7101).**

**Appeal of The COMMITTEE TO OPPOSE the
SALE OF ST. BARTHOLOMEW'S CHURCH
INCORPORATED, J. Sinclair Armstrong, Robert
E. Morris, Jr., Doris Capp Stass, George
H. Weiler, III, Madeline Calder, Beatrice Lotz,
Bromwell Ault, Jr., Neal Goldman, and Charlotte
Pierce Armstrong, (Re: 88-7751).**

Nos. 1431, 1432, Docket 88-7751, 90-7101.

United States Court of Appeals, Second Circuit.

Argued July 17, 1990.

Decided Sept. 12, 1990.

914 F.2d 348

Church brought action against city Landmarks Preservation Commission alleging that application of Landmarks Preservation Law to church imposed unconstitutional burden on free exercise of religion and effected a taking of property without compensation. The United States District Court for the Southern District of New York, John E. Sprizzo, J., 728 F. Supp. 958, found that Landmarks Law did not violate right to free exercise of religion or right against taking of property without just compensation. Appeal was taken. The Court of Appeals, Winter, Circuit Judge, held that: (1) Landmarks

Law, as applied to auxiliary structure next to church's main house of worship, was not unconstitutional burden of free exercise of religion and did not effect taking of property without just compensation; (2) church failed to show that any space deficiency in building could not be remedied by expansion consistent with Landmarks Law; and (3) church failed to show prospective financial hardship entitling it to certificate of appropriateness.

Affirmed.

Douglas M. Parker, New York City (Judah Gribetz, Howard W. Goldstein, George A. Pierce, Mudge Rose Guthrie Alexander & Ferdon, Henry P. Kent Greenawalt, James G. Glazebrook, New York City, of counsel), Monaghan, for plaintiff-appellee (Re: 88-7751), plaintiff-appellant (Re: 90-7101).

Elizabeth Dvorkin, New York City (Victor A. Kovner, Corp. Counsel of the City of New York, Leonard Koerner, Jonathan L. Pines, Dorothy Miner, New York City, of counsel), for defendants-appellees (Re: 88-7751 and 90-7101).

Gerald D. Fischer, New York City, for appellants (Re: 88-7751), amici curiae Committee to Oppose the Sale of St. Bartholomew's Church Inc., J. Sinclair Armstrong, Robert E. Morris, Jr., Doris Capp Stass, George H. Weiler, III, Madeleine Calder, Beatrice Lotz, Bromwell Ault, Jr., Neal Goldman and Charlotte Pierce Armstrong (Re: 90-7101).

Donald G. Glascoff, Jr., Robert Knuts, Cadwalader, Wickersham & Taft, New York City, for amici curiae New York State Interfaith Com'n on Landmarking of Religious Property, Council of Churches of the City of New York, Inc., Queens Federation of Churches, New York State Council of Churches, Nat. Council of Churches of Christ in the U.S.A., Nat. Ass'n of Evangelicals, Baptist Joint Committee on Public Affairs, Evangelical Lutheran Church in America, New York Bd. of Rabbis, Dept. of Church in Soc., Div. of Homeland Ministries, Christian Church (Disciples of Christ), and

Americans United for the Separation of Church and State (Re: 90-7101).

Lee Boothby, Boothby, Ziprick & Yingst, Berrien Springs, Michigan, for amicus curiae Council on Religious Freedom (Re: 90-7101).

George J. McCormack, Cusak & Stiles, New York City, Kevin M. Kearney, Hurley, Kearney & Lane, Brooklyn, New York, for amici curiae Roman Catholic Archdiocese of New York, Roman Catholic Diocese of Brooklyn, and New York State Catholic Conference (Re: 90-7101).

Frank Patton, Jr., Ellis, Stringfellow & Patton, New York City, for amicus curiae Church of St. Paul and St. Andrew (Re: 90-7101).

John J. Kerr, Jr., Elizabeth P. Johnson, Nancy B. Mallery, Simpson Thacher & Bartlett, New York City, for amici curiae Nat. Trust for Historic Preservation, National Center for Preservation Law, New York Landmarks Conservancy, Preservation Action, Fine Arts Federation, Preservation League of New York State, and Women's City Club of New York, Inc. (Re: 90-7101).

William E. Hegarty, Howard G. Sloane, Cahill, Gordon & Reindel, New York City, for amicus curiae Municipal Art Soc. of New York, Inc. (Re: 90-7101).

Before WINTER and WALKER, Circuit Judges, and MUKASEY,* District Judge.

WINTER, Circuit Judge:

This appeal poses the question of whether a church may be prevented by New York City's Landmarks Law, now codified at New York City Administrative Code Sections 25-301 to 25-321 (1986), from replacing a church-owned building with an office tower. The question implicates both First and Fifth Amendment issues. Specifically, the Rector, Wardens, and

Members of the Vestry of St. Bartholomew's Church ("the Church") appeal from Judge Sprizzo's decision that the New York City Landmarks Law, as applied to an auxiliary structure next to the Church's main house of worship, did not impose an unconstitutional burden on the free exercise of religion or effect a taking of property without just compensation.

The district court grounded its decision on its finding that the Church had failed to prove that the landmark regulation prevented the Church from carrying out its religious and charitable mission in its current buildings. We agree that this is the legal standard established by Supreme Court precedent governing both free-exercise and takings claims. Moreover, we find no clear error in the district court's factual determinations. We therefore affirm. We also affirm the denial of a motion to intervene by a group of persons opposed to the Church's plans to develop its property.

BACKGROUND

St. Bartholomew's Church is a Protestant Episcopal Church organized in 1835 under the laws of the State of New York as a not-for-profit religious corporation. The main house of worship ("the Church building") stands on the east side of Park Avenue, between 50th and 51st Streets, in New York City. Constructed beginning in 1917 according to the plans of architect Bertram G. Goodhue, the Church building is a notable example of a Venetian adaptation of the Byzantine style, built on a Latin cross plan. Significant features include its polychromatic stone exterior, soaring octagonal dome, and large rose window. Perhaps most significantly, Goodhue incorporated into his building the Romanesque porch of St. Bartholomew's former Church building at Madison Avenue and 44th Street.

* Hon. Michael B. Mukasey, United States District Judge for the Southern District of New York, sitting by designation.

Designed by the renowned architectural firm of McKim, Mead & White, the porch is composed of a high arched central portal flanked by two lower arched doorways, all supported by slender columns. The doors themselves are richly decorated bronze, depicting Biblical themes.

Adjacent to the Church building, at the northeast corner of Park Avenue and 50th Street, is a terraced, seven-story building known as the Community House. It is the replacement of this building with an office tower that is at issue in the instant matter. Completed in 1928 by associates of Goodhue, the Community House complements the Church building in scale, materials and decoration. Together with the Church building, the Community House houses a variety of social and religious activities in which the Church is engaged. It contains a sixty-student preschool, a large theater, athletic facilities (including a pool, gymnasium, squash court, and weight and locker rooms), as well as several meeting rooms and offices for fellowship and counseling programs. A community ministry program, which provides food, clothing, and shelter to indigent persons, is operated mainly from the Church building. Meals are prepared in a small pantry on the first floor and served in the mortuary chapel. Ten homeless persons are housed nightly in the narthex.

In 1967, finding that "St. Bartholomew's Church and Community House have a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural aspects of New York City," the Landmarks Preservation Commission of the City of New York (the "Commission") designated both buildings as "landmarks" pursuant to the Landmarks Law. This designation prohibits the alteration or demolition of the buildings without approval by the Commission. See N.Y.C. Admin. Code § 25-305(a)(1)(1985).

The Church did not object to the landmarking of its property. In December 1983, pursuant to what is now New York City Administrative Code Section 25-307, the Church

applied to the Commission for a "certificate of appropriateness" permitting it to replace the Community House with a fifty-nine story office tower. This request was denied as an inappropriate alteration. In December 1984, the Church filed a second application, scaling down the proposed tower to forty-seven stories. This application was also denied.

The Church thereafter filed a third application under a different procedure. Pursuant to Sections 207-4.0 and 207-8.0 of the New York City Administrative Code,¹ commonly known as the "hardship exception," it sought a certificate of appropriateness for the forty-seven story tower on the ground of the Community House's present inadequacy for church purposes. The Church's application was the subject of a series of public hearings before the Commission in late 1985 and early 1986. At those hearings, the Commission gathered evidence from various interested parties, including expert testimony and written reports regarding the adequacy of the Community House for the Church's charitable programs, the necessity and cost of structural and mechanical repairs for the Church building and Community House, and the Church's financial condition. Following the public hearings, the Commission convened in Executive Session, open to the public, on several occasions in February 1986. At these meetings the Commission discussed the Church's application, accepted further submissions from interested parties, and took testimony and reports from its own pro bono experts. On February 24, the Commission voted to

1. Now found at Section 25-309, the provision states that a certificate of appropriateness shall be granted to a not-for-profit applicant who shows, *inter alia*, that such

improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is not [sic] longer engaged in pursuing such purposes.

N.Y.C. Admin. Code § 25-309(a)(2)(c)(1985).

deny the application because the Church had failed to prove the necessary hardship. Several months later the Commission issued a lengthy written determination detailing the reasons for its denial.

On April 8, 1986, the Church brought the instant action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. § 1983. The complaint set forth a host of constitutional claims. It alleged that the Landmarks Law, facially and as applied to the Church, violates both the free exercise and establishment clauses of the First Amendment by excessively burdening the practice of religion and entangling the government in religious affairs. It also alleged that the Landmarks Law violates the equal protection and due process clauses of the Fourteenth Amendment because it applies different standards to charitable and commercial institutions respectively and constitutes a taking of property without just compensation. In addition, the Church alleged a variety of procedural due process violations and brought a pendent state law claim alleging that the Church should have been granted a certificate of appropriateness under New York law.

The Church moved for partial summary judgment on its claims of facial unconstitutionality. Defendants cross-moved for summary judgment on all claims. The district court granted summary judgment to defendants with respect to the issues of facial unconstitutionality only. On the First Amendment claims, the court ruled that the Landmarks Law "creates no more than an incidental burden on the practice of religion" and that entanglement doctrine was not applicable. On the equal protection claim, the court ruled that the different hardship tests applied to charitable and commercial organizations were rational. Finally, it held that the notice and hearing provisions of the Landmarks Law comport with constitutional standards of due process.

The district court then held a bench trial with respect to the claims that the Landmarks Law is unconstitutional as applied to the Church. The parties agreed that the evidentiary

record before the district court would be limited to the evidence presented to the Commission, contained in a twenty-three volume appendix. In considering the Church's takings claim, the court adopted the standard articulated by New York State courts: An unconstitutional taking exists "where the landmark designation [of property owned by a charitable organization] would prevent or seriously interfere with the carrying out of the charitable purpose of the institution." *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958, 966-967 (S.D.N.Y. 1989)(opinion and order)(citing *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 454-55, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935 (1980); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974)). The district court applied the same test to the claim of an unconstitutional burden on religion. It thus stated, "[I]n this case, the First Amendment inquiry is identical in scope to the Fifth Amendment inquiry, since to prevail on either claim plaintiff must prove that it can no longer carry out its religious mission in its existing facilities." *Id.* 728 F. Supp. at 966-967.

The district court then examined the record before the Commission in order to determine whether the Church had proved by a preponderance of the evidence that it can no longer carry out its charitable purpose in its existing facilities. The district court found that it had not, for three basic reasons. First, it ruled that the Church had failed to demonstrate that the Community House is insufficient to accommodate the various programs currently based there. Second, it found that the Church had exaggerated the cost of the necessary repairs to the structural and mechanical systems of the Church building and Community House. Third, the court held that the Church had failed to prove that it cannot afford to make the necessary repairs and renovations to its buildings. Having concluded that the Church had not carried its burden of demonstrating that the Landmarks Law precludes it from continuing its activities in its existing facilities, the district court rejected the Church's First

and Fifth Amendment claims and entered judgment for defendants.²

On appeal, the Church renews its free exercise and takings claims and argues that the district court's factual findings were clearly erroneous.

In the course of proceedings, the district court denied a motion to intervene on the side of defendants made by several individual parishioners and the Committee to Oppose the Sale of St. Bartholomew's Church Incorporated, a group of St. Bartholomew's members and others opposed to commercial development of the Church's property. It held that the proposed intervenors had no ownership interest in the property at issue and that their participation would interfere with the efficient administration of the litigation. *See St. Bartholomew's Church v. City of New York*, No. 86 Civ. 2848 (JES), slip op. (S.D.N.Y. Oct. 27, 1986)(order denying motion to intervene). A year later, after the parties agreed that the trial in the instant action should be conducted solely on the record before the Commission, the proposed intervenors renewed their motion, which was again denied. *See St. Bartholomew's Church v. City of New York*, No. 86 Civ. 2848 (JES), slip op. (S.D.N.Y. Apr. 6, 1988)(order denying motion to intervene). The proposed intervenors appeal from this ruling.

2. The district court treated the Church's remaining procedural due process and state law claims as abandoned, because the Church had disavowed any interest in having a new hearing before the Commission, the only relief available to remedy these claims.

DISCUSSION

Sections 1 and 2 of this portion of the opinion reject the Church's free exercise and takings claims. Our discussion assumes the affirmance of the district court's factual findings as detailed in section 3.

1. *The Free Exercise Claim*

The Church argues that the Landmarks Law substantially burdens religion in violation of the First Amendment as applied to the states through the Fourteenth Amendment. In particular, the Church contends that by denying its application to erect a commercial office tower on its property, the City of New York and the Landmarks Commission (collectively, "the City") have impaired the Church's ability to carry on and expand the ministerial and charitable activities that are central to its religious mission. It argues that the Community House is no longer a sufficient facility for its activities, and that the Church's financial base has eroded. The construction of an office tower similar to those that now surround St. Bartholomew's in midtown Manhattan, the Church asserts, is a means to provide better space for some of the Church's programs and income to support and expand its various ministerial and community activities. The Church thus argues that even if the proposed office tower will not house all of the Church's programs, the revenue generated by renting commercial office space will enable the Church to move some of its programs—such as sheltering the homeless—off-site. The Church concludes that the Landmarks Law unconstitutionally denies it the opportunity to exploit this means of carrying out its religious mission. Although the Landmarks Law substantially limits the options of the Church to raise revenue for purposes of expanding religious charitable activities, we believe the Church's claims are precluded by Supreme Court precedent.

As the Court recently stated in *Employment Division v. Smith*, ___ U.S. ___, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the free exercise clause prohibits above all "governmental

regulation of religious beliefs as such.” *Id.* 110 S.Ct. at 1599 (quoting *Sherbert v. Verner*, 374 U.S. 398, 402, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963) and citing cases). No one seriously contends that the Landmarks Law interferes with substantive religious views. However, apart from impinging on religious beliefs, governmental regulation may affect conduct or behavior associated with those beliefs. Supreme Court decisions indicate that while the government may not coerce an individual to adopt a certain belief or punish him for his religious views, it may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers. For example, in *Smith* the Court held that the free exercise clause did not prohibit the State of Oregon from applying its drug laws to the religious use of peyote. *See* 110 S.Ct. 1595. *Cf. United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982).

The synthesis of this caselaw has been stated as follows: “[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Smith*, 110 S.Ct. at 1600 (quoting *Lee*, 455 U.S. at 263 n.3, 102 S.Ct. at 1058 n. 3 (Stevens, J., concurring)). The critical distinction is thus between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented. *See id.* 110 S.Ct. at 1599.

The Landmarks Law is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions. It thus applies to “[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value.” N.Y.C. Admin. Code § 25-302(n)(1986).

It is true that the Landmarks Law affects many religious buildings. The Church thus asserts that of the six hundred landmarked sites, over fifteen percent are religious properties and over five percent are Episcopal churches. Nevertheless, we do

not understand those facts to demonstrate a lack of neutrality or general applicability. Because of the importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be architecturally attractive, many religious structures are likely to fall within the neutral criteria—having “special character or special historical or aesthetic interest or value”—set forth by the Landmarks Law. N.Y.C. Admin. Code § 25-302(n)(1986). This, however, is not evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites.

The Church's brief cites commentators, including a former chair of the Commission, who are highly critical of the Landmarks Law on grounds that it accords great discretion to the Commission and that persons who have interests other than the preservation of historic sites or aesthetic structures may influence Commission decisions.³ Nevertheless, absent proof of the discriminatory exercise of discretion, there is no constitutional relevance to these observations. Zoning similarly regulates land use but it is hardly a process in which the exercise of discretion is constrained by scientific principles or unaffected by selfish or political interests, yet it passes constitutional muster. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

The Church argues that landmarking and zoning differ in that landmarking targets only individual parcels while zoning affects larger segments. However, the Landmarks Law permits the designation of historic districts, see N.Y.C. Admin. Code § 25-303(a)(4)(1986), while all zoning laws provide for variances for individual sites. Even if the two forms of regulation bear the different characteristics asserted by the Church, those

3. The Landmarks Law made a cameo appearance in a recent best-selling novel as a vehicle for political retaliation against a clerical official seeking to develop Church property. See *T. Wolfe, Bonfire of the Vanities*, 569 (1987) (“Mort? You know that church, St. Timothy's? ... Right ... LANDMARK THE SON OF A BITCH!”).

differences are of no consequence in light of *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). There, the Court stated:

[L]andmark laws are not like discriminatory, or 'reverse spot,' zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest whenever they might be found in the city....

Id. at 132, 98 S.Ct. at 2663 (citation omitted).

It is obvious that the Landmarks Law has drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs. In this particular case, the revenues involved are very large because the Community House is on land that would be extremely valuable if put to commercial uses. Nevertheless, we understand Supreme Court decisions to indicate that neutral regulations that diminish the income of a religious organization do not implicate the free exercise clause. See *Jimmy Swaggart Ministries v. Board of Equalization*, ___ U.S. ___, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990); *Hernandez v. Commissioner*, ___ U.S. ___, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). The central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices. In *Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439, 108 S.Ct. 1319, 1326, 99 L.Ed.2d 534 (1988), the Court explained,

It is true that ... indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the

First Amendment.... This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit" ...

We agree with the district court that no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities. Cf. *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 872 (2d Cir. 1988).

In sum, the Landmarks Law is a valid, neutral regulation of general applicability, and as explained below, we agree with the district court that the Church has failed to prove that it cannot continue its religious practice in its existing facilities.⁴

4. The Church also argues that the Landmarks Law involves an excessive degree of entanglement between church and state in violation of the establishment clause. The district court dismissed this argument as irrelevant in the present context, reasoning that the entanglement doctrine applies only to instances of government funding of religious organizations. However, in *Jimmy Swaggart Ministries* the Supreme Court considered an entanglement claim in the context of government taxation of the sale of religious materials by a religious organization. The Court found no constitutional violation, as the regulation imposed only routine administrative and recordkeeping obligations, involved no continuing surveillance of the organization, and did not inquire into the religious doctrine or motives of the organization. See 110 S.Ct. at 697-99. These same factors are of course largely true of the Landmarks Law. The only scrutiny of the Church occurred in the proceedings for a certificate of appropriateness, and the matters scrutinized were exclusively financial and architectural. This degree of interaction does not rise to the level of unconstitutional entanglement.

2. *The Takings Claim*

The Church also claims that the Landmarks Law so severely restricts its ability to use its property that it constitutes confiscation of property without just compensation in violation of the Fifth and Fourteenth Amendments.⁵ However, the Supreme Court's decision in *Penn Central* compels us to hold otherwise.

In *Penn Central*, the Supreme Court held that the application of New York City's Landmarks Law to Grand Central Terminal did not effect an unconstitutional taking. *See* 438 U.S. at 138, 98 S.Ct. at 2666. That famous beaux arts style train station, located in midtown Manhattan (just eight blocks from St. Bartholomew's Church) was designated a landmark in 1967. *See id.* at 115-16, 98 S.Ct. at 2654-55. Shortly thereafter, Penn Central Transportation Company ("Penn Central"), principal owner of the Terminal, in order to increase its income, sought to build a high-rise office tower atop the Terminal. The Landmarks Commission, however, denied the proposal because "[q]uite simply, the tower would overwhelm the Terminal by its sheer mass." *Id.* at 118, 98 S.Ct. at 2656 (quoting the record on appeal). The Supreme Court squarely rejected Penn Central's claim that the building restriction had unconstitutionally "taken" its property. Central to the Court's holding were the facts that the regulation did not interfere with the historical use of the property and that that use continued to be economically viable:

[T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use

5. The Fifth Amendment provides in part, "nor shall private property be taken for public use, without just compensation," U.S. Const. amend. V, and is applicable to the states through the Fourteenth Amendment. *See Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Id. at 136, 98 S.Ct. at 2665.

Applying the *Penn Central* standard to property used for charitable purposes, the constitutional question is whether the land-use regulation impairs the continued operation of the property in its originally expected use. We conclude that the Landmarks Law does not effect an unconstitutional taking because the Church can continue its existing charitable and religious activities in its current facilities. Although the regulation may "freeze" the Church's property in its existing use and prevent the Church from expanding or altering its activities, Penn Central explicitly permits this. In that case, the Landmarks Law diminished the opportunity for Penn Central to earn what might have been substantial amounts by preventing it from building a skyscraper atop the Terminal. Here it prevents a similar development by the Church—one that, in contrast to the proposal to build an office tower over Grand Central Terminal, would involve the razing of a landmarked building—at least so long as the Church is able to continue its present activities in the existing buildings. In both cases, the deprivation of commercial value is palpable, but as we understand Penn Central, it does not constitute a taking so long as continued use for present activities is viable.

The Church offers several arguments to distinguish Penn Central, but we find them unavailing. First, it argues that while Penn Central stipulated that it was able to earn a "reasonable

return" on the Terminal ~~over~~ under the regulation, *see* 438 U.S. at 129, 98 S.Ct. at 2662, in this case, the use of the Community House for commercial purposes would yield an estimated return of only six percent. Even if true, this fact is irrelevant. "Reasonable return" analysis was appropriate to determine the viability of the existing commercial use of the Terminal but has no bearing on the instant matter because the existing use of the Community House is for charitable rather than commercial purposes. So long as the Church can continue to use its property in the way that it has been using it—to house its charitable and religious activity—there is no unconstitutional taking.

Second, the Church notes that it presented a second proposal for a smaller building to the Commission, but Penn Central did not. This hardly makes any difference. Just as the Commission in Penn Central remained open to a building addition that "would harmonize in scale, material and character," 438 U.S. at 137, 98 S.Ct. at 2666 (quoting record on appeal), with the Terminal, it invited appellant to propose an addition to the Community House in the instant matter. Finally, we reject as unsupported appellant's argument that in Penn Central the property owner continued to enjoy valuable, transferable rights to develop the airspace above the Terminal, *see* 438 U.S. at 137, 98 S.Ct. at 2666, while the Church's development rights have little value. *See* Section 3(a) *infra*.⁶

6. Appellant urges further that application of the Landmarks Law to the Church does not substantially advance a legitimate state interest. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834–35, 107 S.Ct. 3141, 3146–47, 97 L.Ed.2d 677 (1987). While land use restrictions must be reviewed in the context of the individual property in question, *see Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928), the same government interest held to be valid in Penn Central—"preserving structures and areas with special historic, architectural or cultural significance," 438 U.S. at 129, 98 S.Ct. at 2662—is equally applicable here.

3. Findings of the District Court

The principal factual finding of the district court—one central to its rejection of the Church's free exercise and takings claims—was that the Church "failed to show by a preponderance of the evidence that it can no longer conduct its charitable activities or carry out its religious mission in its existing facilities." *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958, 974-75 (S.D.N.Y. 1989)(opinion and order).

The Church claims that the Community House is an inadequate facility in which to carry out the various activities that presently comprise the Church's religious mission and charitable purpose. It further claims that it cannot afford to make the needed repairs and renovations to the Community House and Church building. It concludes that it must be allowed to replace the Community House with a revenue-generating office tower. The district court was unconvinced. It found that the Church failed to prove that the Community House is fundamentally unsuitable for its current use and that the cost of repair and rehabilitation is beyond the financial means of the Church. Appellant argues on appeal that these findings were clearly erroneous. Fed.R.Civ.P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 574-75, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985); *Syigma Photo News, Inc. v. High Society Magazine*, 778 F.2d 89, 95-96 (2d Cir. 1985). We disagree.

a. Adequacy of the Community House

The Church claims that the amount and configuration of usable space in the Community House is insufficient to accommodate the Church's various programs. It relies principally upon an analysis of space in the Community House by Walker Associates, an interior design firm hired by the Church. Presented to the Commission in three written reports and related oral testimony (collectively, "the Walker Report"), this study concluded that the demands for space by the Church's various programs exceeded the capacity of the Community House. Additionally, the Walker Report stated that renovation

or expansion was impractical due to the structural inflexibility of the building.

The district court discredited the Walker Report. With regard to space, there is no dispute that the Community House currently is too small. The Walker Report found that 8000 square feet of extra space is needed. The Commission placed the deficiency at about 4500 square feet.⁷

Fatal, however, to the Church's claim is the absence of any showing that the space deficiency in the Community House cannot be remedied by a reconfiguration or expansion that is consistent with the purposes of the Landmarks Law. The Walker Report assumed that the Community House had an out-moded structure that precluded such an option. In fact, the building has a modern, light steel frame structure and was designed so that two additional floors could easily be added. Moreover, the Commission has indicated that it would be receptive to a proposal from the Church for such an addition. While expanding the amount of available space in the Community House may not provide ideal facilities for the Church's expanded programs,⁸ it does offer a means of continuing those programs in the existing building. Certainly the intermediate option of limited expansion must be thoroughly explored before jumping to replacement with a forty-seven story office building.

7. The Walker Report determined that the total space required in the Community House is 41,500 square feet, as against 33,500 square feet of available useable space. The Commission accepted the figure for requirements, but estimated the available useable space at approximately 37,000 square feet.

8. For instance, the existing building cannot readily accommodate the larger gymnasium or greater theater wing space sought by the Church.

b. Cost of Repair and Rehabilitation

The Church also argues that the necessary repairs to the physically deteriorating Church building and Community House would be prohibitively expensive. It relies on a study of the mechanical systems and exteriors of those buildings prepared by O'Brien, Krietzburg and Associates, a construction management firm, and submitted to the Commission through written reports and oral testimony (collectively, "the OKA Report"). The OKA Report estimated that it would cost approximately \$11 million over two years to bring the buildings' mechanical, electrical, and plumbing systems into proper working order and to repair the buildings' exteriors.

The district court also rejected this conclusion, faulting the OKA Report for being biased in favor of replacement over rehabilitation, ignoring actual conditions at the property site, and using an inappropriate method of estimating costs. Further, the district court pointed to contradictory evidence presented to the Commission, both by persons opposing the proposed development and by neutral consultants. Based on this information, the court found \$3 million "phased in over a period of several years" to be a reasonable estimate for repairs and replacement.

On appeal, the Church does not seriously defend the \$11 million estimate contained in the OKA Report. Instead, it accepts the \$3 million estimate for the work that it covers, but argues that this figure disregards certain "major elements of cost." In particular, the Church asserts that an additional \$500,000 is necessary for life safety measures, \$647,000 for repair of the church organ, and \$360,000 for architectural and engineering fees. The City counters that the life safety additions would unnecessarily exceed building code requirements, that organ repair is not a proper expense for this proceeding, and that design fees would be negligible.

We need not rule on this dispute over approximately \$1.5 million because it is not crucial to the district court's operative factual finding. As our discussion in the next section indicates,

even if the potential cost of repairs totaled \$4.5 million, the Church has not adequately demonstrated that it is unable to meet this expense. Thus, the district court's central finding that the Church had failed to prove that it cannot continue in its existing facilities does not hinge on whether any portion of this \$1.5 million was excluded from its estimate of repair costs.

c. The Church's Finances

As a corollary to its claim that repair and rehabilitation of the Church building and Community House would be too costly, the Church argues that its financial condition does not allow it to make the necessary improvements and also continue its other programs. The district court, however, found that appellant had failed adequately to prove this assertion, a finding that is not clearly erroneous.

The Church has three primary sources of support and revenue: contributions in the form of pledges and offerings collected at worship services, income earned on investments, and fees charged for participation in activities conducted under its sponsorship. Investment income is derived from the Church's investment portfolio, known as the Consolidated Church Fund, the value of which stood at nearly \$11 million at the end of 1984. The principal of this endowment consists of funds received as gifts or bequests. In addition, the Church's endowment includes a Properties Fund, representing resources in Church-owned property at acquired cost, net of depreciation, and a miscellaneous General Fund. Combined, these funds totaled just under \$3.5 million at the end of 1984, giving the Church an overall endowment of about \$14.3 million at that time. Over the decade preceding 1985, the Church's sources of revenue have sporadically kept pace with expenses, exceeding them in 1975, 1977, 1980, 1983 and 1984, and falling behind in 1976, 1978, 1979, 1981, and 1982. On the whole, the Church had only a slight net deficit over this period.

The Church's principal argument is that a major improvement expenditure of the type required to repair and

renovate the Church building and Community House would severely damage this "precarious" balance of revenues and expenses. Because such an expenditure would come from endowment funds, the Church contends, future investment income will inevitably decline as the result of a depleted portfolio. Such a decrease in future revenues, it concludes, will produce "severe deficits."

While a reduced principal will yield less investment income, the Church has not demonstrated that its budget cannot withstand building improvement expenditures under a reasonable financing procedure. For example, as the district court noted, withdrawals from the endowment might be made gradually to minimize lost investment income, or the Church might borrow against its endowment, and repay the loan over an extended period of time. Appellant has offered no financial projections or cash flow analyses to prove that these financing methods are not feasible. Without such data, the district court's finding that the Church failed to prove prospective financial hardship is not clearly erroneous.

We also cannot ignore the paucity of evidence offered by the Church to show that other forms of revenue are not available. Its claim that a capital fundraising drive already has been exhausted as a financing possibility is undercut by evidence that longtime members of the congregation cannot recall any such drive. Also, evidence before the Commission indicated that the transferable development rights for the airspace above the Church property are, contrary to the Church's claim, not worthless.

Finally, the Church argues that even if its endowment could withstand a building project, it is not at liberty to withdraw large sums for that purpose because of legal restrictions on the use of its investment funds. In particular, it urges that Section 717 of the New York Not-For-Profit Corporation Law prohibits the Church from expending the sums necessary to undergo a building project. That provision, however, does no more than impose upon the Church a fiduciary duty of care to

manage the congregation's money in a prudent and responsible fashion, *see* N.Y. Not-for-Profit Corp. Law §§ 513, 717 (McKinney Supp. 1990), and would be implicated only if the expenditures in question would unacceptably impair the Church's financial condition.'

4. *The Motion to Intervene*

The proposed intervenors argue that the district court should have granted their motion to intervene on the side of the defendants at trial. We may reverse the denial of a motion to intervene only for "abuse of discretion." *See United States v. Hooker Chemical & Plastics*, 749 F.2d 968, 990 (2d Cir. 1984). No such abuse is present here. The district court properly denied intervention as of right under Fed.R.Civ.P. 24(a)(2) because the proposed intervenors lack any legally protectable interest in this matter. Under New York law, as a Protestant Episcopal Church, St. Bartholomew's is a corporate body placed in the trusteeship of its church wardens and vestrymen. *See* New York Religious Corporation Law § 41 (McKinney Supp. 1990). To the extent that the proposed intervenors are members of the parish, they enjoy only the right to vote in the election of the church wardens and vestrymen. *See id.* § 43. Thus, the Rector, Wardens and Members of the Vestry is the proper party to litigate the constitutionality of encumbrances placed on Church property.

Nor did the district court abuse its discretion by denying permissive intervention under Rule 24(b). It was eminently reasonable to conclude that intervention only would complicate

9. Although the Church also points to Section 513 of the Not-for-Profit Corporation Law, which deals with the administration of assets received for specific purposes, *see* N.Y. Not-for-Profit Corp. Law § 513 (McKinney Supp. 1990), it concedes that donor-imposed restrictions are not a "principal constraint" preventing the improvement of its property. It does not challenge the district court's finding that enough of the Church's funds are unrestricted so as to allow it to undertake a building project.

the litigation, and thereby "unduly delay ... the adjudication of the rights of the original parties." Fed.R.Civ.P. 24(b).

CONCLUSION

For the reasons stated above, we affirm both the judgment of the district court in favor of the defendants-appellees and the order of that court denying the motion to intervene.

**The RECTOR, WARDENS, AND MEMBERS
OF THE VESTRY OF ST. BARTHOLOMEW'S
CHURCH, Plaintiff,**

v.

**CITY OF NEW YORK, AND LANDMARKS
PRESERVATION COMMISSION OF THE
CITY OF NEW YORK, Defendants.**

No. 86 Civ. 2848 (JES).

United States District Court, S.D. New York.

Dec. 13, 1989.

As Amended Jan. 24, 1990.

728 F. Supp. 958

Church sued city Landmarks Preservation Commission, seeking determination that statute under which Commission had denied church's application of certificate of appropriateness to tear down activities building portion of designated landmark complex and replace it with high-rise office building which would be used in part for church activities, on grounds that statute violated church's First, Fifth and Fourteenth Amendment rights. The District Court, Sprizzo, J., held that: (1) statute did not violate free exercise clause; (2) statute did not involve government in excessive entanglement with affairs of church; (3) statute did not violate equal protection rights of church by imposing different standards for granting certificates in the cases of commercial and charitable entities; (4) statute did not deprive church of its procedural due process rights; and (5) statute was not unconstitutional as applied, as church failed to demonstrate that it could not use existing facilities, with affordable rehabilitation, to satisfy its religious needs.

Judgment for Commission.

Mudge, Rose, Guthrie, Alexander & Ferdon, New York City (Douglas M. Parker, Judah Gribetz, Howard W. Goldstein, George A. Pierce, of counsel), Henry P. Monaghan, Kent Greenawalt, James G. Glazebrook, Chancellor of St. Bartholomew's Church, New York City, for plaintiff.

Cadwalader, Wickersham & Taft, New York City (Donald G. Glascoff, Jr., Joseph Polizzotto, Lisa J. Sotto, of counsel), for amicus curiae in support of plaintiff (New York State Interfaith Commission on Landmarking of Religious Property).

Cusack & Stiles, New York City (George J. McCormack, of counsel), for amici curiae in support of plaintiff (Roman Catholic Archdiocese of New York).

Hurley, Kearney & Lane, Brooklyn, N.Y. (Kevin M. Kearney, of counsel), for amici curiae in support of plaintiff (Roman Catholic Archdiocese of Brooklyn).

Jeffrey R. Notarbartolo, Brooklyn, N.Y., for amicus curiae in support of plaintiff (Committee of Denominational Executives).

Peter L. Zimroth, Corp. Counsel of the City of New York, New York City (Jonathan L. Pines, Lucy A. Cardwell, Asst. Corp. Counsels, of counsel), for defendants.

Simpson, Thacher & Bartlett, New York City (John J. Kerr, David W. Sussman, Elizabeth P. Johnson, of counsel), for amici curiae in support of defendants (The New York Landmarks Conservancy, Nat. Trust for Historic Preservation, Nat. Center for Preservation Law, Preservation Action, Fine Arts Federation, Preservation League of N.Y. State, and Women's City Club of New York, Inc.).

Mannarino Bader Bloom Fischer & Woll, P.C., New York City (Gerald D. Fischer, of counsel), for amicus curiae in support of defendants (Committee to Oppose the Sale of St. Bartholomew's Church, Inc.).

John Sexton, Norman Dorsen, New York City, for amicus curiae in support of defendants.

Cahill Gordon & Reindel, New York City (William E. Hegarty, Howard G. Sloane, David F. Freedman, of counsel), for amici curiae in support of defendants (The New York Landmarks Conservancy, National Trust for Historic Preservation, National Center for Preservation Law, Preservation Action, Fine Arts Federation, Preservation League of New York State, and Women's City Club of New York, Inc.).

OPINION AND ORDER

SPRIZZO, District Judge:

Plaintiff, the Rector, Wardens and Members of the Vestry of St. Bartholomew's Church bring this action pursuant to 42 U.S.C. § 1983, for declaratory and injunctive relief and for damages. Plaintiff contends that defendants, City of New York and the Landmarks Preservation Commission of the City of New York ("Commission"), have violated its rights under the First, Fifth and Fourteenth Amendments to the United States Constitution, and under the laws of the State of New York. The Court has, by agreement of the parties, held a bench trial on the evidence previously submitted to the Commission in 1985 and 1986. After reviewing that evidence de novo and considering the law applicable thereto, the Court makes the following findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a)¹⁰

10. The parties have set forth the evidence submitted to the Commission in the form of a twenty-three volume appendix ("App."). References to that evi-

BACKGROUND

St. Bartholomew's Church is a Protestant Episcopal Church organized under the laws of the State of New York as a non-profit religious corporation. The Church building, designed by Bertram Goodhue, was completed in 1919, and is located on the east side of Park Avenue between East 50th and East 51st Streets in the City of New York. *See* 8 App. 2540; 10 App. 3432. Next to the church building is a seven floor community house constructed by Goodhue's successor firm during the years 1926-28. *See* 8 App. 2540, 10 App. 3433; 11 App. 4062. The community house provides, in combination with the church building, a home for a variety of social and religious activities in which the Church is engaged.¹¹ In addition to the two structures, the Church's Park Avenue property is improved by a garden and terrace area. *See* 11 App. 4062.

In March of 1967, the church, the exterior of the community house and the surrounding property were designated as landmarks by the Commission, a designation plaintiff did not then oppose.¹² *See* 8 App. 2540. Subsequently, however, plaintiff filed two applications with the Commission seeking a Certificate of Appropriateness under what is now N.Y. City Admin.Code § 25-307.¹³ The first such application, filed in

dence in this Opinion are to the volume and page number of that appendix, e.g., 1 App. 246 refers to appendix volume one at page 246.

11. Among other things, the community house provides athletic facilities, including a pool and basketball court, a theatre, a pre-school for sixty students, meeting rooms, kitchen and dining facilities and office space. The church building, in conjunction with the community house, provides clothing, meals and sleeping quarters for the homeless. *See* 10 App. 3433-35.

12. The Church's ability to alter or demolish the buildings is restricted by a landmark designation. Any such alteration requires the approval of the Commission. *See* N.Y.Admin.Code § 25-305(a)(1).

13. Section 307(a) provides in relevant part: "the commission shall determine whether the proposed work would be appropriate for and consistent with the

December 1983, sought permission to tear down the community house and erect in its place a fifty-nine story office tower. See Affidavit of Gene Norman ("Norman Aff.") at ¶ 21. This application was denied as an inappropriate alteration on June 21, 1984. See *id.* at ¶ 25. The second application, filed in December 1984, sought to demolish the community house in favor of a forty-seven story office tower. See *id.* at ¶ 27; 8 App. 2470. This application was also denied as inappropriate on August 26, 1985. See Norman Aff. at ¶ 29. After the denial of plaintiff's second application, a further application to build the forty-seven story tower was made on September 3, 1985, on grounds of insufficient return pursuant to sections 207-4.0 and 207-8.0 of the New York City Administrative Code.¹⁴ See 10 App. 3234.

The Commission held public hearings on plaintiff's third application on October 29, 1985, December 3, 1985, and January 21, 1986. See 2 App. 321; 3 App. 704; 4 App. 1114. At those hearings the Commission heard testimony from all interested parties, including expert witnesses who testified regarding the suitability of the community house to its charitable purpose, the extent and cost of necessary structural and mechanical repairs for both the church and community house, and the state of the Church's finances. In addition, the

effectuation of the purposes of this chapter."

14. Section 207-8.0(a)(2)(c), now found at § 25-309(a)(2)(c), provides that a certificate of appropriateness on the ground of insufficient return shall be granted when the applicant shows, inter alia, that: "such improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is no longer engaged in pursuing such purposes." In addition, New York law requires that a certificate of appropriateness be granted where failure to do so would "prevent or seriously interfere" with the applicant's ability to carry out its charitable purpose. See *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 454-55, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935 (1980); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974).

Commission received many reports from the testifying experts and other submissions. After the close of the last public hearing, the Commission met in Executive Session, open to the public, on February 6, 11, 18, 20, and 24, 1986 to discuss plaintiff's application, to accept further submissions from interested parties, and to take testimony and reports from the Commission's own pro bono consultants. *See* 5 App. 537, 1638; 6 App. 1803, 1914; 7 App. 2117. After considering all of the evidence submitted, the Commission voted on February 25, 1986, to deny plaintiff's application. *See* Norman Aff. at ¶ 67. On October 10, 1986, the Commission issued its written determination denying the application. *See id.* at ¶ 68; 19 App. 6448.

Thereafter, plaintiff brought the instant action alleging the following constitutional claims: 1) that the landmark laws are facially unconstitutional to the extent they impact the property of any church because they interfere with the free exercise of religion in violation of the First Amendment; 2) that the landmark laws are facially unconstitutional because they treat charitable and commercial institutions differently in violation of the equal protection clause of the Fourteenth Amendment; 3) that the landmark laws are unconstitutional as applied to St. Bartholomew's as a consequence of the Commission's denial of their applications for a certificate of appropriateness, because that denial interfered with the free exercise of religion and because the denials constitute a taking of property without compensation; 4) that the landmark laws both facially and as applied to St. Bartholomew's violate the establishment clause by requiring an intrusive examination of the church's internal affairs in the hardship application process; 5) that the landmark laws both facially and as applied violate the doctrine of substantive due process by depriving the Church of its property's reasonable income production without a compelling state interest; 6) that the legal standards for designation of a landmark and for granting a certificate of appropriateness are impermissibly vague in violation of the due process clause of the Fourteenth Amendment; 7) that the lack of cross-examination of witnesses

in the certificate of appropriateness procedure, the vagueness of the Commission's first two denial letters, the Commission's failure to consider economic hardship in the second application and the Commission's failure to allow plaintiff to submit responses to the Commission's witnesses all constitute due process violations. In addition, plaintiff brought state law claims for Article 78 relief alleging that the Church should have been granted a certificate of appropriateness under New York law.¹⁵

Plaintiff then moved for partial summary judgment on its claims of facial unconstitutionality, and defendant cross-moved for summary judgment.¹⁶ These motions were later supplemented to add the issue of whether plaintiff's Article 78 claims were justiciable in a federal forum. The Court ruled on these motions in open court. Those rulings are recapitulated below in section I.¹⁷

15. Plaintiff could have sought review of the Commission's factual and legal determinations in an Article 78 proceeding in New York State Supreme Court but elected not to do so. See N.Y.Civ.Prac. L. & R. § 7801 (McKinney 1981).

16. In addition to moving for summary judgment on plaintiff's claims of facial unconstitutionality defendants asserted that plaintiff's as applied claims were insufficient as well because plaintiff still retained some viable economic use of its property.

17. In addition to the summary judgment motions in this case, a motion to intervene on the side of the defendants was made by the Committee to Oppose the Sale of St. Bartholomew's ("Committee"), a group of church members opposed to the development project. The Court determined that intervention as of right was not appropriate because the members of the Committee had no ownership interest in the Church property itself, but at best only had the right to vote on the development issue in an intra-church proceeding. The Court also denied permissive intervention as a matter of discretion because, quite aside from the jurisdictional problems caused by such intervention, that intervention would have seriously interfered with the parties' desire to expeditiously resolve the constitutional claims raised on the administrative record, and might well have led to collateralization of the issues and further discovery. See *infra* Discussion at II. In addition, the Court was persuaded that affording amicus curiae status to the putative intervenors provided an adequate substitute for

DISCUSSION

I. Plaintiff's Claims of Facial Unconstitutionality

A. First Amendment Claims

The Court rejects plaintiff's contention that the landmark laws unconstitutionally interfere with the free exercise of the religious beliefs of any church that is designated a landmark. The gravamen of plaintiff's free exercise claim is that by restricting a church's ability to use its property as it wishes in support of its religious or charitable mission, the landmark laws impermissibly burden the exercise of religious belief.

That claim lacks merit. A statute abridges the free exercise of religion when it coerces the affected individuals into violating their religious beliefs or when "[it] penalize[s] religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by other citizens." *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 449, 108 S.Ct. 1319, 1325, 99 L.Ed.2d 534 (1988); *see also Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 303, 105 S.Ct. 1953, 1962, 85 L.Ed.2d 278 (1985); *Sherbert v. Verner*, 374 U.S. 398, 402, 83 S.Ct. 1790, 1792, 10 L.Ed.2d 965 (1963). A substantial interference with the free exercise of religion may also occur where church property is taken, even by condemnation, for state purposes. Cf. *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 871 (2d Cir.1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1527, 103 L.Ed.2d 833 (1989).

However, the mere possibility that a church may at some time want to make a different use of its landmarked property creates no more than an incidental burden on the practice of religion that does not "require the state to come forward with a compelling reason justifying its actions." *See Yonkers, supra*,

permissive intervention.

858 F.2d at 871. Therefore, the designation of church buildings as landmarks does not in and of itself violate the free exercise clause.¹⁸ This is especially true since the landmark designation does not deprive the Church of the right to seek a certificate of appropriateness to alter its property if the nature of that property is such that it no longer can be used to carry out its religious or charitable mission.

Plaintiff also contends that because the New York statutory and judicial tests for determining when a certificate of appropriateness may be granted on the grounds of hardship require an intrusive examination into the finances and internal workings of the Church, those tests, both on their face and as applied to St. Bartholomew's, result in an excessive entanglement between government and religion in violation of the establishment clause. While the establishment clause does prohibit excessive entanglement between government and religion, see *Lemon v. Kurtzman*, 403 U.S. 602, 619, 91 S.Ct. 2105, 2114, 29 L.Ed.2d 745 (1971), that doctrine has normally been applied in factual situations in which state aid to religious institutions requires extensive and continuous monitoring of church activities to ensure that government financing is being used solely for secular purposes. See *id.*; see also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 90, 502-03, 99 S.Ct. 1313, 1319-20, 59 L.Ed.2d 533 (1979). That doctrine has no applicability where, as here, the government must make an inquiry into church finances for the limited purpose of determining the validity of a church's claim of financial hardship.

18. The Court also rejects plaintiff's contention that whenever a law has any impact upon a religious institution it must be justified by a compelling state interest. A compelling state interest is only required when the law impermissibly burdens the free exercise of religion. See *Yonkers, supra*, 858 F.2d at 871. Absent such a burden the state need only show a rational basis for the legislation. The New York landmark laws have such a rational basis. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 129, 98 S.Ct. 2646, 2661, 57 L.Ed.2d 631 (1978). Thus, plaintiff's substantive due process claims are without merit as well.

B. Equal Protection Claims

Plaintiff alleges that because the landmark laws provide different hardship tests for commercial and charitable entities including religious institutions, they violate the equal protection clause. Because the Court has already found that the laws do not on their face impermissibly burden religion, any differences in treatment need only be justified by a rational basis.¹⁹

As a threshold matter it should be noted that the equal protection clause only protects persons who are similarly situated from disparate treatment. Therefore, the differences between commercial entities and charitable institutions render that argument dubious at best. In any event, those differences clearly provide the state with a rational basis for treating those entities differently.

Since the hardship test for commercial enterprises is based upon the ability to earn a reasonable return from its property, it is obvious that a similar standard could not be applied to an entity which exists for charitable and not commercial purposes.²⁰ Indeed, it would make little sense, and might in fact be irrational, to apply the charitable test to a commercial property or the commercial test to a charitable property. It follows that the so called disparity in treatment is nothing more than a reasonable effort by the state to afford hardship relief to both classes of entities based upon criteria specifically tailored to the nature of each.

19. Plaintiff also argues that its equal protection rights have been violated because the landmark laws treat landmarked and non-landmarked churches differently. This argument is at best an attack upon the general rationality of the landmark laws, an attack foreclosed by *Penn Central*, *supra*.

20. N.Y. City Admin.Code § 207-8.0(a)(1)(a), now § 25-309(a)(1)(a), permits commercial property to obtain a certificate of appropriateness on the ground of insufficient return if, inter alia, the landmarked building "is not capable of earning a reasonable return."

C. Due Process Claims

Plaintiff also argues that the legal standards for designating a landmark and for granting a certificate of appropriateness are impermissibly vague and give the Commission virtually unfettered discretion in making its decisions. Therefore plaintiff argues the laws do not comport with the minimum requirements of procedural due process.

At the very least, due process requires notice and an opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 332-33, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976). The landmark laws unquestionably meet that standard in that they provide a property owner with adequate notice of the law's requirements and with the opportunity for an extensive hearing, especially in view of the interpretation placed upon those laws by the courts of New York. *See, e.g., Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 454-55, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935 (1980); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974). It follows that since a reasonable person can and should know what standards must be met in bringing an application for a certificate of appropriateness or in opposing a landmark designation, those statutes are not impermissibly vague. *See Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S.Ct. 1853, 1858, 100 L.Ed.2d 372 (1988).

While it is true that the procedures available at a landmark hearing are not the same as those available at a civil trial, that is not what due process requires. *See Mathews, supra*, 424 U.S. at 333, 96 S.Ct. at 901. Moreover, under New York law there is a right to judicial review of Commission decisions in the state court system, *see supra* note 6, a circumstance that further supports the rejection of plaintiff's due process claims.²¹ *See*

21. There is no need to resolve the merits of plaintiff's contention that the Commission violated its procedural due process rights during the hardship hearing. Those alleged defects could have, and should have, been addressed

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95 & n. 14, 105 S.Ct. 3108, 3120-21 & n. 14, 87 L.Ed.2d 126 (1985).

In sum, the Court rejects plaintiff's contentions that the landmark laws are unconstitutional on their face as to all churches, and grants summary judgment for defendants as to those claims.

II. The Trial of this Action

Although concluding that partial summary judgment should be granted for defendants on plaintiff's claims of facial unconstitutionality, the Court held a trial with respect to plaintiff's claim that the landmark laws were unconstitutional as applied. Plaintiff's contentions in that regard are twofold: (1) that because it could no longer carry out its religious mission in its existing facilities the denial of its hardship application constituted a taking of its property without just compensation; and (2) the denial of that application constituted an impermissible burden on the exercise of its religious beliefs.

Initially, the Court was of the view that it could have a trial de novo and consider facts not before the Commission in deciding whether the landmark laws had been unconstitutionally applied to plaintiff. Subsequently, the Court reconsidered this view and concluded that it would be inappropriate to predicate a

through an Article 78 proceeding in state supreme court. Moreover, plaintiff has expressly disclaimed any desire to have the matter returned to the landmark commission for a new hearing, which is the only relief that would be appropriate even if the Court were to accept plaintiff's argument that this hearing, as opposed to the standard applicable to such proceedings in general, deprived the church of procedural due process. In view of that circumstance, the Court will treat that claim as abandoned. For the same reason, the Court will not decide the merits of whether Article 78 relief can constitute a claim cognizable in a federal court, an issue that has caused some difficulty. Compare *Cooney v. American Horse Shows Ass'n*, 495 F. Supp. 424, 433 n. 7 (S.D.N.Y. 1980) with *Herrmann v. Brooklyn Law School*, 432 F. Supp. 236, 239-40 (E.D.N.Y. 1976).

finding of unconstitutionality on facts which the Commission never had an opportunity to consider, especially since under the statutory scheme, a new application for hardship exemption can be made at any time based upon additional facts.²² Therefore, the Court, as requested and consented to by the parties,²³ will evaluate this claim solely on the basis of the record before the Commission.²⁴ However, since the Court is presented with a

22. Indeed, it would hardly be consistent with the principles of comity and federalism that require a federal court to abstain where a remedy may be provided by state law without reaching the constitutional issues, *see Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500-501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941), for this Court to deprive the Commission of the opportunity conferred upon it by state law to determine whether new facts support plaintiff's hardship application as a matter of state law.

23. The putative intervenors did not either request or consent to that procedure.

24. Defendants contend that under *University of Tennessee v. Elliot*, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986), the Court must not only confine itself to the administrative record, but must also give preclusive effect to the factual findings of the Commission. *Elliot* requires that when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the courts of that state. *See id.* at 798-99, 106 S.Ct. at 3225-26.

However, whether a proceeding is to be regarded as judicial for purposes of *Elliot* preclusion is a question of federal law. Moreover, the fact that a proceeding may meet the minimum requirements of due process does not necessarily require that it be afforded preclusive effect. In addition, state law must require that the proceeding be afforded preclusive effect before the federal issue need even be reached. The Court is unpersuaded that, as a matter of federal law, landmark proceedings should be regarded as quasi-judicial in nature. Indeed, they are more akin to town meetings than judicial proceedings, in that all may be heard regardless of the relevance of their testimony, evidentiary rules do not apply, and questioning by the attorneys for the interested parties is not permitted.

In any event, it does not appear that New York law would require that a decision of the Commission be given preclusive effect. Under New York

claim of constitutional deprivation, it must make a de novo review of that evidence.²⁵

law, a proceeding is quasi-judicial and therefore entitled to preclusive effect if the agency is authorized to act in an adjudicatory fashion, the procedures it employs are sufficient to permit confidence that the facts and issues were fully tested, and the parties reasonably expected to be permanently bound by the result reached. See *Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 276-77, 528 N.E.2d 153, 155, 532 N.Y.S.2d 230, 232 (1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 785, 102 L.Ed.2d 777 (1989). Where, however, an agency makes findings based upon conditions which are subject to change and further review, New York is not likely to give those proceedings preclusive effect. See *id.* An application for a certificate of appropriateness based on hardship appears to be such a proceeding. There is no limit on the number of applications which may be made, and an applicant's economic condition, which is likely to change over time, will affect the likelihood of success of the application. Thus, an application once denied may be pursued again with a different result at a future date.

Moreover, in a case decided by the New York Court of Appeals prior to the *Elliot* decision, that court found that Landmark designation hearings are not quasi-judicial for purposes of determining what type of Article 78 review they will receive. See *Lutheran Church in America, supra*, 35 N.Y.2d at 128 n. 2, 316 N.E.2d at 309 n. 2, 359 N.Y.S.2d at 13 n. 2. The Court based that holding upon the fact that designation proceedings are not adversary hearings involving cross-examination. See *id.* Certificate of appropriateness hearings share these characteristics.

25. It is, of course, plaintiff's burden to prove by a preponderance of the evidence that its constitutional rights have been violated on the basis of that record, even though some of the evidence at the hearing may not have been admissible at a federal civil trial.

III. Plaintiff's Unconstitutional As Applied Claims

A. Just Compensation Claims

Plaintiff's claim of unconstitutionality as applied depends upon plaintiff's ability to prove that it can no longer carry out its religious mission and charitable purpose in its existing facilities because those facilities are inadequate and because it cannot afford to expend the sums necessary to make those facilities adequate. It is that circumstance that underlies plaintiff's contention that the denial of its hardship application deprived it of its property without just compensation in violation of the Fifth Amendment and abridged its right to freely exercise its religious belief in violation of the First Amendment.

At the outset it should be noted that the Supreme Court has never passed upon the constitutionality of a regulation, such as the landmark laws, as applied to the property of a charitable or religious institution. However, in dealing with commercial property, the Supreme Court has recognized that there is no magic formula for determining when a taking has occurred. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-24, 98 S.Ct. 2646, 2658-59, 57 L.Ed.2d 631 (1978). Factors of particular significance, however, are the economic impact of the government action, i.e., its interference with legitimate investment expectations, and the character of the government action, e.g., is the action a physical taking or a land use regulation. See *id.* at 124, 98 S.Ct. at 2659. These factors must be evaluated in light of the overriding rule that the Fifth Amendment contemplates continued use of a property as it was used in the past, and thus permits no substantial interference with the property owner's primary investment expectations or reasonable beneficial use. See *id.* at 136, 98 S.Ct. at 2665.

While the concept of legitimate investment expectation is not directly transferable to a charitable or religious institution, the concepts of reasonable beneficial use and the owner's primary expectations are equally applicable to both. Moreover,

the New York Courts have developed a takings standard for charitable institutions embodying these concepts that is a constitutionally acceptable standard for determining when there has been a taking of charitable property, i.e., where the landmark designation would prevent or seriously interfere with the carrying out of the charitable purpose of the institution. See *Society for Ethical Culture, supra*, 51 N.Y.2d at 454-55, 415 N.E.2d at 925, 434 N.Y.S.2d at 935; *Lutheran Church in America, supra*, 35 N.Y.2d at 131, 316 N.E.2d at 311, 359 N.Y.S.2d at 16. Therefore, the Court adopts this test to determine whether plaintiff's Fifth Amendment rights were violated as a consequence of the denial of its hardship application.

B. Free Exercise Claim

Assuming arguendo that plaintiff's charitable work is the exercise of religion for First Amendment purposes, plaintiff must prove that it can no longer carry out this work in its existing facilities to sustain its free exercise claim. See *Lyng, supra*, 108 S.Ct. at 1326; *Yonkers, supra*, 858 F.2d at 871-72. Thus, in this case, the First Amendment inquiry is identical in scope to the Fifth Amendment inquiry, since to prevail on either claim plaintiff must prove that it can no longer carry out its religious mission in its existing facilities.

The Court has examined the record before the Commission in an effort to determine if plaintiff has proved by a preponderance of the evidence that it can no longer carry out its charitable purpose in its existing facilities. For the reasons that follow, the Court finds that plaintiff has failed to carry that burden, and that judgment must be entered for the defendant.

C. Findings of Fact

Plaintiff contends that the community house is an inadequate structure for carrying out the Church's religious mission and charitable purpose. Plaintiff further alleges that both the community house and the church are in an advanced state of disrepair and cannot be rehabilitated for less than \$11 million.

Thus, plaintiff argues it can only rehabilitate the Church and carry out its charitable purpose if it is allowed to demolish the community house, build the office tower in its place, and reap the revenues therefrom. Finally, plaintiff contends that its finances are in such a deplorable state that even if the two buildings could be rehabilitated for less than \$11 million, it cannot afford to spend more than a minimal sum upon such work. The Court will address each of these contentions in turn.

1. *Adequacy of Community House Space*

Plaintiff's first factual contention concerns the amount of the space contained in the community house, and the configuration of that space in relation to the needs of the Church's programs. Plaintiff contends that the evidence shows that: the usable space available in the community house is insufficient to accommodate the variety of activities that compete for the space; that it wishes to expand its existing programs but cannot do so given those space constraints; that it is forced to conduct activities in spaces that are inappropriate for those activities;²⁶ and that renovation of the interior of the community house is impractical and not feasible.

Plaintiff relies primarily upon an analysis of the use and configuration of the community house space undertaken at plaintiff's request by Walker Associates, an interior design firm. In addition to the testimony of its president, Keith Keppler, *see* 2 App. 462; 15 App. 5275, Walker submitted three reports to the Commission, *see* 10 App. 3429; 14 App. 4843; 16

26. A focal point of plaintiff's contention in this regard is its claim that it is forced to carry out its feeding program for the homeless from the church mortuary chapel, and thus must carry food from the community house kitchen downstairs and the length of an entire city block to reach the church. In addition, the Church contends that it cannot continue to provide shelter for the homeless in the church narthex because that space is inappropriate, and because it can only provide shelter for ten persons per night in that area. *See* 2 App. 380, 382-85.

App. 5586. In those reports and testimony, Walker concluded that the community house is not adequate, suitable or appropriate for the purposes to which it is devoted. *See* 10 App. 3431-32. Walker found that the community house lacked sufficient usable space, that the existing usable space was inefficiently designed and poorly distributed, and that the multiplicity of uses of that space created scheduling conflicts.²⁷ *See id.*

In addition, Walker concluded that the building's structure was outmoded and inflexible, and that renovation of the structure's interior was impractical and prohibitively expensive due to the massive structural systems within the building, the elevator shafts and support structures, and the impossibility of demolishing thick load bearing walls. *See id.* at 3432. In sum, Walker found that the Church could only continue to successfully carry out its charitable and social activities by moving to another more suitable facility, and that the proposed forty-seven story office tower was such a facility. *See* 4 App. 1321-22; 10 App. 3432.

However, the Court, based upon flaws in Walker's methodology and upon conflicting evidence, finds that Walker's conclusions are incorrect, and that plaintiff has failed to prove by a preponderance of the evidence that the community house is unsuitable for its current use.

The credibility and accuracy of Walker's findings are undercut by several factors. First, it is clear that Walker did not attempt to examine the building plans of the community house before it determined that the building could not be easily altered. *See* 3 App. 916. If it had done so, it would have found that in fact the building does not contain massive load bearing walls, but instead is a light steel frame structure that is easily

27. Specifically, Walker found that the community house contained a net usable area of approximately 38,000 sq. ft., that the Church programs required a usable area of approximately 46,000 sq. ft., leaving a space deficit of approximately 8,000 sq. ft. *See* 2 App. 492.

susceptible to alteration.²⁸ See 4 App. 1240; 16 App. 5721-22. Second, Walker based its finding of inadequate usable space upon calculations appropriate to a commercial office building, the area of Walker's expertise, and not upon calculations appropriate to plaintiff's facility. See 6 App. 1956; 7 App. 2186. Third, measuring the adequacy of space in an existing building was an unusual task for Walker, which was used to projecting space for designs of proposed buildings.

In addition, Walker conducted its study by asking questions of the heads of each program using the facility, and, unsurprisingly, found that each program head thought he or she needed more space. See 14 App. 4853. Moreover, examination of the questionnaires used reveals that they fail to distinguish between program needs and mere desires for expansion. Furthermore, Walker presented no evidence of objective observations of how the facility is actually used over time. The Court finds therefore that Walker's conclusions are without adequate factual support.

Moreover, other evidence demonstrates that the community house is adequate for the purposes to which it is devoted. Weekly building activity schedules, if anything, supported the conclusion that the community house's space was in fact underutilized, that many of the rooms were not used at all during the day, or were used by very few, and that no scheduling conflicts were apparent. See 12 App. 4431-33; 13 App. 4736.²⁹ In fact, the Church was able to rent out some of its space to area businesses, and has formed a special committee to increase those rentals. See 13 App. 4733-34. Moreover, although plaintiff

28. For this reason, and because it was unsupported by any evidence, the Court also rejects Walker's contention that interior renovation of the community house would cost approximately \$3.4 million.

29. Testimony also indicated that Church membership, and membership in the community club, a primary user of the community house, has been steadily declining. See 12 App. 4389-91.

complained that it could accommodate only sixty pupils in its preschool, it has an occupancy permit for one hundred pupils, and therefore underutilizes the capacity of even its preschool facilities. *See* 7 App. 2223; 15 App. 5786.

Walker's conclusion that the community house is inefficiently configured is belied by the fact that it failed to consider inexpensive methods of reconfiguring large rooms, for example, by installing removable room partitions. Finally, the Commission's own calculations reveal that even accepting Walker's estimate of the space needed to conduct current activities, the community house's space deficiency was much lower than Walker's estimate, and that any deficiency could be made up at relatively low cost by utilizing the basement as a storage area. *See* 17 App. 5800.

The credibility of plaintiff's evidence is further undercut by the fact that its proposed new building, which reverses the proportion of space above and below ground in the existing facility, would be only marginally better, if at all, in terms of usable space, *see* 3 App. 893-94, and significantly inferior in many other respects such as the quality of the below ground environment, the choked single access point of the office building lobby,³⁰ and the absence of any plan to encompass the ministry to the homeless in the new structure, which oddly enough is a program that plaintiff asserts it does not have adequate space for in the present structure.³¹ *See* 7 App. 2201-10. In sum, plaintiff's reliance upon the Walker report and the Court's

30. Plaintiff complained that the community house's two entrances, providing access space of 700 sq. ft., are inadequate, but the proposed building has a single access point with an area of 450 sq. ft., and must be shared with the rest of the occupants of the forty-seven story tower. *See* 7 App. 2201.

31. In addition, plaintiff has failed to show why the existing community house dining facilities, or even the auditorium, could not replace the church mortuary chapel as the site of the breakfast feeding program for the homeless. Both of those facilities are much closer to the kitchen and are never used in the morning.

rejection of that report supports the conclusion that plaintiff has failed to show by a preponderance of the evidence that the community house is an inadequate structure for conducting its activities.³²

2. *Required Exterior and Mechanical Repairs*

Plaintiff's second major factual contention is that the community house and the church building both require a complete overhaul and replacement of existing mechanical systems, and substantial repair and replacement of exterior structural systems at a cost of approximately \$11 million. Plaintiff's sole support for this proposition is a study of the mechanical systems and the building exteriors undertaken in 1985 by O'Brien, Krietzburg and Associates ("OKA"), a firm of professional construction managers, submitted through two reports, *see* 10 App. 3281; 14 App. 4951, and the testimony of OKA's president, James O'Brien, *see* 2 App. 413; 4 App. 1205, 1341. In formulating its recommendations, OKA relied upon the report of Edwards & Zuck, P.C., who evaluated the plumbing, mechanical and electrical systems, *see* 10 App. 3367, the report of Caine, Farrell & Bell, architects, who examined the exteriors, *see id.* at 3388, and the report of Barr & Barr, Inc., builders, who provided cost estimates of the repairs. *See id.* at 3396.

Based upon these three reports, OKA concluded that poor maintenance programs in the past have caused the overall exterior physical condition of the buildings to seriously

32. In fact, the Church did not commission the Walker space study until the Spring of 1985, long after plans for the new building had been drawn. *See* 4 App. 1307. This fact supports the view that the Church's claim that the building is inadequate was an afterthought designed to provide another argument for demolishing the building after its first two attempts to get the proposed construction approved had failed. This point was aptly made by Commissioner Halsband: "in this case the new building was made in the absence of a program—the program was done last—and that whole intermediate step of comparing what you've got to what you need seems to never to [sic] have been expressed...." 6 App. 1936. 9

deteriorate, and that the buildings' mechanical systems were outdated and in some cases inoperative. *See id.* at 3286-87. OKA's prescription for these ills involves virtually complete replacement of mechanical, electrical and plumbing systems and significant replacement of exterior elements. *See id.* at 3298-3366. Rehabilitation of existing systems was not considered. The total cost of these repairs and replacements was estimated by OKA to be \$11,663,500, on the assumption that construction was to be completed within two years. *See* 14 App. 4956-63.

The Court does not find OKA's assessment persuasive for the following reasons. First, it is clear from the testimony of Ronald Alexander, a former vestryman in charge of the Church's building committee, that OKA was told to maximize the cost of estimates to the greatest defensible extent, and that OKA undertook to do just that by advocating replacement over rehabilitation wherever possible. *See* 3 App. 724. Moreover, OKA admitted a bias in favor of replacement,³³ and indeed had little experience in rehabilitating older buildings. In addition, OKA did not rely on a full set of plans and specifications in evaluating necessary repairs. *See* 4 App. 1367-68. Instead, OKA relied solely on the reports of other firms who were not called to testify before the Commission.

These reasons would be a sufficient basis to reject OKA's conclusions. There is, however, ample additional evidence to show that not only did OKA grossly overestimate the amount of work required, but that its method for allocating costs to that work is seriously flawed. For example, OKA recommended wholesale replacement of the church's front steps and the blue stone steps leading from Park Avenue to the terrace. *See* 10 App. 3312. However, other evidence showed that only the top platform of the church steps and one of the blue stone steps

33. For example, Mr. O'Brien stated that in his view he would "come in and gut the whole thing, because there was nothing worth saving." 4 App. 1349.

required replacement. See 5 App. 1641. Similarly, OKA advocated replacement of all of the sidewalk when only part of the sidewalk was cracked and in need of repair.

In estimating the required roof repairs, OKA ignored the fact that individual tiles could be reused in repairing the tile roofs, see 5 App. 1681-82, and that several of the flat roofs had been recently replaced and thus did not need to be replaced again. See 5 App. 1687; 13 App. 4656-57. All of these facts tend to show that the OKA report was not based upon careful examination and consideration of what repairs were truly necessary, but instead upon the presumption that all problems should be solved by complete replacement. See 12 App. 4632. Thus, the Court finds OKA's evaluation of necessary exterior repairs incredible and unpersuasive.

Similar flaws are apparent in OKA's evaluation of necessary repairs to the buildings' interior mechanical systems. Since OKA claimed to rely on Edwards & Zuck, it is especially pertinent to note that OKA in fact departed from the recommendations of that report. For example, while Edwards & Zuck recommended retaining and modifying existing ductwork in the community house, see 10 App. 3371, OKA estimated that most of the ductwork had to be replaced. See *id.* at 3349-50.

This selective reliance on Edwards & Zuck supports the inference, absent some other basis for the estimate, that OKA was guessing at what repairs were truly necessary. This inference is supported by other OKA estimates as well. For example, OKA advocated wholesale replacement of the electrical systems, ignoring the fact that much of that work had already been accomplished. See 6 App. 2033; 10 App. 3361-62. Indeed, OKA did not even know that there were no outstanding fire code violations, and therefore made recommendations which incorrectly assumed that the auditorium balcony and the church basement had not been brought up to fire code standards. See 10 App. 3308-11. Similarly, OKA's sprinkler system estimate ignored areas of the community house that already had sprinkler

systems, and included costs for a sprinkler system based upon a square footage estimate for the entire building.

Moreover, OKA's report evidenced a total lack of familiarity with what could be accomplished by retaining and refurbishing existing mechanical systems. Rather than undertaking a detailed analysis of the plumbing, electrical and heating ventilation and air conditioning systems to determine what could be salvaged, OKA simply opted to replace it all. In so doing OKA ignored, for example, the advantages to be gained by retaining the direct current electrical systems, and the virtually unlimited service life of older properly maintained equipment. *See* 16 App. 5749.

In sum, it is clear from OKA's report that their object was not to determine what repairs were truly necessary or required, but to maximize the amount of work and the cost of that work. There is simply no other explanation, and none has been offered, for OKA's wholesale reliance upon replacement and complete rejection of rehabilitation, especially since there is abundant evidence that many of the systems examined could in fact be rehabilitated.

Quite aside from the defects in OKA's analysis noted above, OKA's method of estimating costs is highly questionable. In estimating costs, OKA relied first upon the cost estimates of Barr & Barr, and second upon its own comparison of the Barr & Barr estimate to those contained in R.S. Means Co., Means Cost Data (1985 ed.), a standard reference work for construction cost estimates. *See* 14 App. 4955. The Means handbook provides cost estimates for a given type of work, *e.g.*, electrical system replacement, on a per square foot of building space basis. *See id.*

While this may be an acceptable method of estimating costs for new construction where there is no existing structure, it is not, as several experts testified, either an appropriate or accurate method of estimating costs in an existing facility because the square foot method fails to account for elements in the

existing structure that can be used and adapted to fit in with the rehabilitative work. See 3 App. 849, 879, 910, 923; 6 App. 2035. Thus, cost estimates based on a square foot calculation are likely to overstate the actual cost of repair and rehabilitation, or for that matter, replacement.³⁴

OKA's estimates are also suspect because they are based not upon first hand examination of the facilities, but upon Barr & Barr's estimates, and Barr & Barr was never called to testify before the Commission to explain their calculations. In addition, the Court finds that OKA overstated its costs by including a 1.67 multiplier for interior work on a landmark when the interior of the community house is not landmarked. See *id.* at 2002. Similarly, OKA included a twelve percent addition for architectural and engineering fees that is not only well above the industry average for such fees, see 13 App. 4624, but also applied that fee to types of work that do not normally require such expertise. See 6 App. 2003.³⁵

3. *The Contradictory Evidence*

It should also be noted that substantial evidence contradicting OKA's findings was submitted by the Committee to Oppose the Sale of St. Bartholomew's Church ("Committee to Oppose"), see Report of John Altieri, 13 App. 4656; Report of Robert Silman Assoc., P.C., 7 App. 2182, 13 App. 4628, 16

34. One witness testified that OKA's cost estimates were as much as three times too high. See 6 App. 2003.

35. The Court also finds OKA's insistence on compressing the work into a two year period to be unreasonable. While this recommendation obviously serves to magnify the financial hardship to the Church by requiring large expenditures in a short period of time, it would also require, in all likelihood, severely restricting the use of the facilities to accomplish major repairs. In addition, the recommendation ignores fiscal reality as well. A more reasonable approach, and the one used by other organizations, would be to do the most essential work first, and spread the expenditures out over a longer period of time.

App. 5721; Report of the Ehrenkrantz Group, P.C., 13 App. 4632; Report of James Stewart Polshek and Partners, 13 App. 4620, 16 App. 5709, and by the Commission's own pro bono consultants. *See* Report of Polonia Restoration Co., Inc., 16 App. 5731; Report of the Department of General Services of the City of New York ("DGS"), 16 App. 5743. The Court relies on this evidence as well in concluding that OKA's estimates are neither persuasive or credible.

(a) The Mechanical System

Mr. Bronson Binger and a team from DGS were clearly the experts most qualified to pass upon the costs of renovating an older building since they make approximately one hundred such estimates every year. *See* 6 App. 2036. Even more significantly, Mr. Binger personally participated in the renovation of the Church of the Heavenly Rest, a building also designed by Goodhue, and was thus intimately familiar with St. Bartholomew's mechanical systems.³⁶ *See id.* at 1859-60.

In conducting his assessment, Binger assembled a team which included an electrical engineer, a heating ventilation and air conditioning engineer, a plumbing engineer, and a cost estimator experienced in each of those areas. *See id.* at 1858-59. Binger's team approached the problem by examining each piece of equipment individually, determining what the life expectancy of each piece was and what needed to be replaced, and then pricing out the work for each piece individually. *See id.* at 1863. Binger's conclusion was that although St. Bartholomew's has deteriorated, it is operable. *See id.* He also concluded that

36. The Church protests that it cannot be expected to perform the miracles that Mr. Binger performed for the Church of the Heavenly Rest. Quite aside from the fact that Mr. Binger's achievements, although impressive, are not miraculous, Mr. Binger volunteered to assist the Church pro bono in carrying out the recommended repairs and rehabilitation. *See* 6 App. 2018; 16 App. 5751. Given the Church's claim of financial hardship, it is difficult to understand why it has not accepted this offer.

if the existing equipment is refurbished, much of it has an unlimited useful life; that the equipment that has deteriorated can generally be rebuilt for less than the cost of new equipment; and that much of the existing equipment can be made serviceable for relatively small amounts of money over a period of years. *See id.* at 1863-66.

Although Binger acknowledged that his estimate was preliminary, and that older mechanical systems do require knowledgeable maintenance personnel, the Court finds Mr. Binger's estimate to be the most credible and persuasive evidence presented to the Commission.

Binger also concluded that those items that had to be repaired immediately included repairs to the steam meter room, the condenser water system, the D.C. fan motors, the exhaust systems, the Organ, and the heating and plumbing systems at a total cost of \$398,000. *See* 16 App. 5747-48. He estimated that further improvements to those and other systems should be undertaken over the next two to ten years at an additional cost of \$400,000, and that further elective improvements could be undertaken if finances permitted at a cost of \$632,000. *See id.* In all, Binger's estimates that the church and community house mechanical systems could be put into excellent shape for \$1,430,000. *See id.*

(b) The Exterior Work

Other than the OKA report, the only other evidence of the cost of exterior repairs submitted to the Commission was the report of the Polonia Restoration Co., Inc., a corporation specializing in exterior renovation. *See* 16 App. 5731. Although Polonia's methodology was not detailed in the fashion of Binger's methodology, it appears that Polonia considered repair as an alternative to replacement, and provided cost estimates based on the actual work to be done rather than on a square foot basis. *See* 16 App. 5731-38. The Court concludes, therefore, that Polonia's estimate is the most credible and reasonable assessment of the work required on the exterior of the building.

While Polonia agreed that most of the exterior areas addressed by the OKA report needed attention, Polonia differed as to the extent of the work necessary, whether there should be repair rather than replacement, and differed substantially as to cost. Polonia concluded that it would be appropriate to carry out exterior repairs over five years, and that essential repairs could be accomplished at a cost of \$1,141,903 with further optional repairs costing \$514,000, for a total cost of 1,655,903. *See id.* at 5734.

Thus, if the Binger estimate for interior work of \$1,430,000 is added to Polonia's estimate of \$1,655,903 the total cost of renovation for both buildings is approximately \$3,085,903 phased in over a period of several years. This estimate is, of course, drastically lower than the OKA estimate. The Church contends, however, that it cannot afford to expend even three million dollars on repairs and replacement.

4. The Church's Financial Condition

Plaintiff contends that even if it could put the church and the community house in good working order for \$3 million, its financial circumstances do not permit it to expend that amount of money while it continues to run its other programs. The Court rejects this contention as unsupported by the evidence produced before the Commission.

There is little disagreement in the record over the size of the Church's endowment. Although subject to fluctuations in the stock market, the market value of the Church's portfolio stood in excess of \$12.5 million at the end of 1985.³⁷ *See* 16 App. 5487, 5646. Its total funding for 1984 was \$14,355,000,

37. In addition to its endowment assets, the Church owns a twelve room cooperative apartment at 860 Park Avenue which it uses as a residence for its minister, Reverend Thomas Bowers. Although that asset is carried on the books at \$104,000, estimates of its market value range much higher. *See* 12 App. 4378.

including other operating revenues. *See* 2 App. 598. While this sizeable endowment would appear on its face to be capable of supporting a capital expenditure of \$3 million, plaintiff contends that much of that endowment cannot be expended under New York law, and much of the rest of the endowment is restricted for specific purposes.³⁸

Although this contention may be true in a general sense, plaintiff has failed to recognize that some of the restrictions permit the use of these funds to support of the church building and the community house. These funds could therefore be used for necessary capital expenditures. Moreover, these funds if used for this purpose could free up unrestricted funds that have been designated by the vestry for the same purpose.

One witness before the Commission estimated that as much as \$6 million of the endowment could be used for capital expenditure purposes. *See* 6 App. 1971. Of that \$6 million, \$2.9 million is expendable for specific purposes, and \$3.1 million at the discretion of the vestry. *See id.* Plaintiff's own accountants reported that of the Church's \$12 million endowment, \$2.7 million was expendable for designated purposes, \$4.5 million was unrestricted and \$4.8 million was restricted as to principal. *See* 13 App. 4569; *see also* 4526-27. Thus, the Court finds plaintiff's claim that because parts of the endowment are restricted it cannot use some of them for capital projects to be incredible and unsupported by the evidence.

38. The endowment is restricted by law in two ways. First, New York law prohibits expenditure of those parts of the endowment restricted by the donor unless the donor consents or the not-for-profit corporation obtains a judicial release. *See* N.Y. Not-for-Profit Corp. Law § 522 (McKinney Supp. 1989). Second, New York law restricts expenditure of those parts of the endowment designated by the donor for specific purposes to expenditure for those purposes. *See id.* New York law leaves the spending of unrestricted funds, such as the net realized gains on an endowment, to the sound discretion of the vestry. *See id.* In addition, some of the endowment has been designated by the vestry for specific purposes. However, the vestry is permitted to redesignate that money at any time.

The Church also contends that if it takes \$3 million out of its endowment, it will be unable to operate its other programs due to loss of income from the endowment. While it is true that income from the endowment makes up a significant portion of the Church's \$3 million annual operating revenue, *see* 15 App. 5392, that claim is unpersuasive for the following reasons.

First, the Church does not have to remove \$3 million from the endowment all at once. The endowment could be depleted gradually over a period of years as the work on the church and the community house is performed." Gradual depletion would not only lessen operating revenue lost due to lower dividend and interest income, but would also allow capital appreciation to offset the yearly withdrawals. Second, the Church has, over the last ten years operated at close to a break even level, showing surpluses in some years and losses in others. *See* 2 App. 510; 10 App. 3484-87.⁴⁰

Moreover, it has done so while spending more than \$1.6 million on expenses related to the development of the office tower. *See* 13 App. 4655; 16 App. 5637. These facts not only show that the Church is able to make use of large amounts of endowment income for discretionary spending, but also constrain the Court to reject plaintiff's contention that it has been forced to make drastic cutbacks in operating expenses because

39. Both the Binger and Polonia estimates sensibly provided that work should be phased in over several years with the most urgently needed repairs taking precedence. This is the normal practice for undertaking major renovation work, primarily for financial reasons. *See* 3 App. 906-07; 16 App. 5747. In addition, the Church never established that it could not borrow a lump sum against its endowment and amortize the loan over an even longer period. *See* 5 App. 1777.

40. This is true in spite of the fact that the Church budget does not distinguish between operating and capital expenditures, *see* 16 App. 5673, and thus some of the amount reflected as operating expenses may in fact be capital expenditures.

current revenues from endowment income are insufficient to fund the Church's programs.

Finally, the Church has presented no evidence to show what effect withdrawals from the endowment would have on its operating budget. In fact, it did not provide the Commission with any financial projections that would enable this Court to determine its future financial prospects. This failure is fatal to plaintiff's claim of prospective financial hardship.

Not only has the Church failed to provide such financial projections, it has failed to consider either the possibility of a capital fund raising project or the possible sale of the Church's air rights to a nearby building. Plaintiff's own expert testified that he thought a successful fund raising drive could raise as much as \$2 million over a period of years. *See* 2 App. 517-18; 11 App. 3741-42. Although plaintiff vaguely asserts that such a campaign met with failure in 1980, plaintiff has failed to submit any proof to support this contention, and has, as noted above, submitted proof through its own expert supporting a contradictory inference. The Court finds, therefore, that fund raising is at least a reasonable alternative that must be explored before plaintiff's claim of financial hardship can be accepted as credible.⁴¹

Similarly, plaintiff denies that there is any possibility of selling its air rights to raise revenue.⁴² Plaintiff relies primarily on the assertion that it has not had any offers to buy those rights. In fact, interest in purchasing those rights was expressed in a written submission to the Commission. *See* 16 App. 5727.

41. The reasonableness of this alternative is amply illustrated by the experiences of other churches and synagogues that have conducted successful capital fund raising campaigns. *See* 17 App. 5846-76.

42. Air rights refer to the right to develop buildings surrounding the Church property in a way that would intrude upon the air space which is otherwise part of the Church's property interest. The value of those rights has been estimated at over \$55 million. *See* 11 App. 4114.

It also appears that interest in the development rights was expressed in the past, but was not pursued by the Church. See *id.* at 5678, 5582-85. Thus, the Court finds that sale of the Church's air rights presents a reasonable method of alternative fund raising that must be explored before a claim of financial hardship can be supported.⁴³

In sum, the Court finds that the Church has failed to show that it cannot afford to pay for the cost of necessary repairs to the church and the community house. It follows that plaintiff has failed to show that its financial situation precludes it from restoring its property and carrying out its religious mission and charitable purpose. Therefore the Court finds, as a matter of fact, that the Church has failed to prove that its community house is inadequate for the purposes to which it is devoted, that the Church has failed to prove that it is incapable of carrying out its charitable purpose within those facilities, and that although those facilities do require some repair and rehabilitation, the Church has failed to show that it cannot afford to pay for those necessary repairs and rehabilitation.

43. Plaintiff also contends that it is not reasonable to expend \$3 million on improvement of its property in light of the low market value of the property. The Court rejects this argument. In support of this argument plaintiff submitted the testimony and report of Brown, Harris, Stevens, Inc. See 2 App. 525, 4 App. 1247, 11 App. 4059, 15 App. 5287. However, Brown, Harris, Stevens estimated that after necessary repairs the community house would have a market value, as landmarked, of approximately \$15 million, and that the church would have a market value, as landmarked, of \$20 million, for a total landmarked value of \$35 million. See 11 App. 4063. The Court finds that \$3 million is a wholly reasonable sum for repairs in light of plaintiff's own estimated value of the properties, an estimate which the Committee to Oppose corroborated. See 3 App. 826.

CONCLUSION

Since plaintiff has failed to show by a preponderance of the evidence that it can no longer conduct its charitable activities or carry out its religious mission in its existing facilities, plaintiff's First and Fifth Amendment claims must be rejected. The clerk is directed to enter judgment for the defendants and close the above-captioned action.

It is SO ORDERED.

UNITED STATES CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Fourteenth Amendment

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**THE ADMINISTRATIVE CODE AND CHARTER
OF THE
CITY OF NEW YORK**

Title 25

Land Use

* * *

CHAPTER 3

Landmarks Preservation and Historic Districts

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|----------|--|
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- § 25-321 **Applicability.**

§ 25-301 Purpose and declaration of public policy.

a. The council finds that many improvements, as herein defined, and landscape features, as herein defined, having a special character or a special historical or aesthetic interest or value and many improvements representing the finest architectural products of distinct periods in the history of the city, have been uprooted, notwithstanding the feasibility of preserving and continuing the use of such improvements and landscape features, and without adequate consideration of the irreplaceable loss to the people of the city of the aesthetic, cultural and historic values represented by such improvements and landscape features. In addition, distinct areas may be similarly uprooted or may have their distinctiveness destroyed, although the preservation thereof may be both feasible and desirable. It is the sense of the council that the standing of this city as a world wide tourist center and world capital of business, culture and government cannot be maintained or enhanced by disregarding the historical and architectural heritage of the city and by countenancing the destruction of such cultural assets.

b. It is hereby declared as a matter of public policy that the protection, enhancement, perpetuation and use of improvements and landscape features of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people. The purpose of this chapter is to (a) effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's

cultural, social, economic, political and architectural history; (b) safeguard the city's historic, aesthetic and cultural heritage, as embodied and reflected in such improvements, landscape features and districts; (c) stabilize and improve property values in such districts; (d) foster civic pride in the beauty and noble accomplishments of the past; (e) protect and enhance the city's attractions to tourists and visitors and the support and stimulus to business and industry thereby provided; (f) strengthen the economy of the city; and (g) promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city.

§ 25-302 Definitions. As used in this chapter, the following terms shall mean and include:

a. "Alteration." Any of the acts defined as an alteration by the building code of the city.

b. "Appropriate protective interest." Any right or interest in or title to an improvement parcel or any part thereof, including, but not limited to, fee title and scenic or other easements, the acquisition of which by the city is determined by the commission to be necessary and appropriate for the effectuation of the purpose of this chapter.

c. "Capable of earning a reasonable return." Having the capacity, under reasonably efficient and prudent management, of earning a reasonable return. For the purposes of this chapter, the net annual return, as defined in subparagraph (a) of paragraph three of subdivision v of this section, yielded by an improvement parcel during the test year, as defined in subparagraph (b) of such paragraph, shall be presumed to be the earning capacity of such improvement parcel, in the absence of substantial grounds for a contrary determination by the commission.

d. "City-aided project." Any physical betterment of real property, which:

(1) may not be constructed or effected without the approval of one or more officers or agencies of the city; and

(2) upon completion, will be owned in whole or in part by any person other than the city; and

(3) is planned to be constructed or effected, in whole or in part, with any form of aid furnished by the city (other than under this chapter), including, but not limited to, any loan, grant, subsidy or other mode of financial assistance, exercise of the city's powers of eminent domain, contribution of city property, or the granting of tax exemption or tax abatement; and

(4) will involve the construction, reconstruction, alteration or demolition of any improvement in a historic district or of a landmark.

e. "Commission." The landmarks preservation commission.

f. "Day." Any day other than a Saturday, Sunday or legal holiday; provided, however, that for the purposes of subdivision d of section 25-317 of this chapter, the term "day" shall mean every day in the week.

g. "Exterior architectural feature." The architectural style, design, general arrangement and components of all of the outer surfaces of an improvement, as distinguished from the interior surfaces enclosed by said exterior surfaces, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such improvement.

h. "Historic district." Any area which:

(1) contains improvements which:

(a) have a special character or special historical or aesthetic interest or value; and

(b) represent one or more periods or styles of architecture typical of one or more eras in the history of the city; and

(c) cause such area, by reason of such factors, to constitute a distinct section of the city; and

(2) has been designated as a historic district pursuant to the provisions of this chapter.

i. "Improvement." Any building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment.

j. "Improvement parcel." The unit of real property which (1) includes a physical betterment constituting an improvement and the land embracing the site thereof, and (2) is treated as a single entity for the purpose of levying real estate taxes, provided however, that the term "improvement parcel" shall also include any unimproved area of land which is treated as a single entity for such tax purposes.

k. "Interior." The visible surfaces of the interior of an improvement.

l. "Interior architectural feature." The architectural style, design, general arrangement and components of an interior, including, but not limited to, the kind, color and texture of the building material and the type and style of all windows, doors, lights, signs and other fixtures appurtenant to such interior.

m. "Interior landmark." An interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as an interior landmark pursuant to the provisions of this chapter.

n. "Landmark." Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated as a landmark pursuant to the provisions of this chapter.

o. "Landmark site." An improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated, and which has been designated as a landmark site pursuant to the provisions of this chapter.

p. "Landscape feature." Any grade, body of water, stream, rock, plant, shrub, tree, path, walkway, road, plaza, fountain, sculpture or other form of natural or artificial landscaping.

q. "Minor work." Any change in, addition to or removal from the parts, elements or materials comprising an improvement, including, but not limited to, the exterior architectural features or interior architectural features thereof and, subject to and as prescribed by regulations of the commission if and when promulgated pursuant to section 25-319 of this chapter, the surfacing, resurfacing, painting, renovating, restoring or rehabilitating of the exterior architectural features or interior architectural features or the treating of the same in any manner that materially alters their appearance, where such change, addition or removal does not constitute ordinary repairs and maintenance

and is of such nature that it may be lawfully effected without a permit from the department of buildings.

r. "Ordinary repairs and maintenance." Any:

- (1) work done on any improvement; or
- (2) replacement of any part of an improvement;

for which a permit issued by the department of buildings is not required by law, where the purpose and effect of such work or replacement is to correct any deterioration or decay of or damage to such improvement or any part thereof and to restore same, as nearly as may be practicable, to its condition prior to the occurrence of such deterioration, decay or damage.

s. "Owner." Any person or persons having such right to, title to or interest in any improvement so as to be legally entitled, upon obtaining the required permits and approvals from the city agencies having jurisdiction over building construction, to perform with respect to such property any demolition, construction, reconstruction, alteration or other work as to which such person seeks the authorization or approval of the commission pursuant to section 25-309 of this chapter.

t. "Person in charge." The person or persons possessed of the freehold of an improvement or improvement parcel or a lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent or any other person directly or indirectly in control of an improvement or improvement parcel.

u. "Protected architectural feature." Any exterior architectural feature of a landmark or any interior architectural feature of an interior landmark.

v. "Reasonable return." (1) A net annual return of six per centum of the valuation of an improvement parcel.

(2) Such valuation shall be the current assessed valuation established by the city, which is in effect at the time of the filing of the requests for a certificate of appropriateness; provided that:

(a) The commission may make a determination that the valuation of the improvement parcel is an amount different from such assessed valuation where there has been a reduction in the assessed valuation for the year next preceding the effective date of the current assessed valuation in effect at the time of the filing of such request; and

(b) The commission may make a determination that the value of the improvement parcel is an amount different from the assessed valuation where there has been a bona fide sale of such parcel within the period between March fifteenth, nineteen hundred fifty-eight, and the time of the filing of such request, as a result of a transaction at arm's length, on normal financing terms, at a readily ascertainable price, and unaffected by special circumstances such as, but not limited to, a forced sale, exchange of property, package deal, wash sale or sale to a cooperative. In determining whether a sale was on normal financing terms, the commission shall give due consideration to the following factors:

(1) The ratio of the cash payment received by the seller to (a) the sales price of the improvement parcel and (b) the annual gross income from such parcel;

(2) The total amount of the outstanding mortgages which are liens against the improvement parcel (including purchase money mortgages) as compared with the assessed valuation of such parcel;

(3) The ratio of the sales price to the annual gross income of the improvement parcel, with consideration given, where the improvement is subject to residential rent control, to the total amount of rent adjustments previously granted, exclusive of rent adjustments because of changes in dwelling space, services, furniture, furnishings, or equipment, major capital improvements, or substantial rehabilitation;

(4) The presence of deferred amortization in purchase money mortgages, or the assignment of such mortgages at a discount;

(5) Any other facts and circumstances surrounding such sale which, in the judgment of the commission, may have a bearing upon the question of financing.

(3) For the purposes of this subdivision v:

(a) Net annual return shall be the amount by which the earned income yielded by the improvement parcel during a test year exceeds the operating expenses of such parcel during such year, excluding mortgage interest and amortization, and excluding allowances for obsolescence and reserves, but including an allowance for depreciation of two per centum of the assessed value of the improvement, exclusive of the land, or the amount shown for depreciation of the improvement in the latest required federal income tax return, whichever is lower; provided, however, that no allowance for depreciation of the improvement shall be included where the improvement has been fully depreciated for federal income tax purposes or on the books of the owner; and

(b) Test year shall be (1) the most recent full calendar year, or (2) the owner's most recent fiscal year, or (3) any twelve consecutive months ending not more than ninety days prior to the filing (a) of the request for a certificate, or (b) of an application for a renewal of tax benefits pursuant to the provisions of section 25-309 of this chapter, as the case may be.

w. "Scenic landmark." Any landscape feature or aggregate of landscape features, any part of which is thirty years old or older, which has or have a special character of special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated a scenic landmark pursuant to the provisions of this chapter.

§ 25-303 Establishment of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts. a. For the purpose of effecting and furthering the protection, preservation, enhancement, perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, the commission shall have power, after a public hearing:

(1) to designate and, as herein provided in subdivision j, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of landmarks which are identified by a description setting forth the general characteristics and location thereof;

(2) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to, a list of interior landmarks, not including interiors utilized as places of religious worship, which are identified by a description setting forth the general characteristics and location thereof;

(3) to designate and, in order to effectuate the purposes of this chapter, to make supplemental designations as additions to a list of scenic landmarks, located on property owned by the city, which are identified by a description setting forth the general characteristics and location thereof; and

(4) to designate historic districts and the location and boundaries thereof, and, in order to effectuate the purposes of this chapter, to designate changes in such locations and boundaries and designate additional historic districts and the location and boundaries thereof.

b. It shall be the duty of the commission, after a public hearing, to designate a landmark site for each landmark and to designate the location and boundaries of such site.

c. The commission shall have power, after a public hearing, to amend any designation made pursuant to the provisions of subdivisions a and b of this section.

d. The commission may, after a public hearing, whether at the time it designates a scenic landmark or at any time thereafter, specify the nature of any construction, reconstruction, alteration or demolition of any landscape feature which may be performed on such scenic landmark without prior issuance of a report pursuant to subdivision c of section 25-318. The commission shall have the power, after a public hearing, to amend any specification made pursuant to the provisions of this subdivision.

e. Subject to the provisions of subdivisions g and h of this section, any designation or amendment of a designation made by the commission pursuant to the provisions of subdivisions a, b and c of this section shall be in full force and effect from and after the date of the adoption thereof by the commission.

f. Within five days after making any such designation or amendment thereof, the commission shall file a copy of same with the secretary of the board of estimate and with the department of buildings, the city planning commission, the board of standards and appeals, the fire department and the department of health.

g. (1) The secretary of the board of estimate, within five days after the filing of such copy with such secretary, shall refer such designation or amendment thereof to the city planning commission, which, within thirty days after such referral, shall submit to the board of estimate a report with respect to the relation of such designation or amendment thereof to the zoning resolution, projected public improvements and any plans for the

development, growth, improvement or renewal of the area involved.

(2) The board of estimate may modify or disapprove such designation or amendment thereof within ninety days after a copy thereof is filed with the secretary of the board provided that the planning commission has submitted the report required by this subdivision or that thirty days have elapsed since the referral of the designation or amendment to the commission by the secretary of the board. If the board shall disapprove such designation or amendment thereof, it shall cease to be in effect on the date of such action by the board. If the board shall modify such designation or amendment thereof, such modification shall be in effect on and after the date of the adoption thereof by the board.

h. (1) The commission shall have power, after a public hearing, to adopt a resolution proposing rescission, in whole or in part, of any designation or amendment or modification thereof mentioned in the preceding subdivisions of this section. Within five days after adopting any such resolution, the commission shall file a copy thereof with the secretary of the board of estimate, who shall, within five days after such filing, refer such resolution to the city planning commission.

(2) Within thirty days after such referral, the city planning commission shall submit to the board of estimate a report with respect to the relation of such proposed rescission to the zoning resolution, projected public improvements and any plans for the development, growth, improvement, or renewal of the area involved.

(3) Such board may approve, disapprove or modify such proposed rescission within ninety days after a copy of the resolution proposing same is filed with the secretary of the board. If such proposed rescission is approved or modified by the board, such rescission or modification thereof shall take effect on the date of such action by the board. If such proposed

rescission is disapproved by the board, or is not acted on by the board within such period of ninety days, it shall not take effect.

i. The commission may at any time make recommendations to the city planning commission with respect to amendments of the provisions of the zoning resolution applicable to improvements in historic districts.

j. All designations and supplemental designations of landmarks, landmark sites, interior landmarks, scenic landmarks and historic districts made pursuant to subdivision a shall be made pursuant to notices of public hearings given, as provided in section 25-313.

k. Upon its designation of any improvement parcel as a landmark and of any landmark site, interior landmark, scenic landmark or historic district or any amendment of any such designation or rescission thereof, the commission shall cause to be recorded in the office of the register of the city of New York in the county of which such landmark, interior landmark, scenic landmark or district lies, or in the case of landmarks, interior landmarks, scenic landmarks and districts in the county of Richmond in the office of the clerk of said county of Richmond, a notice of such designation, amendment or rescission describing the party affected by, in the case of the county of Richmond, its land map block number or numbers, and its tax map, block and lot number or numbers, and in the case of all other counties, by its land map block and lot number or numbers.

§ 25-304 Scope of commission's powers. a. Nothing contained in this chapter shall be construed as authorizing the commission, in acting with respect to any historic district or improvement therein, or in adopting regulations in relation thereto, to regulate or limit the height and bulk of buildings, to regulate and determine the area of yards, courts and other open spaces, to regulate density of population or to regulate and restrict the locations of trades and industries or location of buildings designed for specific uses or to create districts for any such purpose.

b. Except as provided in subdivision a of this section, the commission may, in exercising or performing its powers, duties or functions under this chapter with respect to any improvement in a historic district or on a landmark site or containing an interior landmark, or any landscape feature of a scenic landmark, apply or impose, with respect to the construction, reconstruction, alteration, demolition or use of such improvement or landscape feature or the performance of minor work thereon, regulations, limitations, determinations or conditions which are more restrictive than those prescribed or made by or pursuant to other provisions of law applicable to such activities, work or use.

§ 25-305 Regulation of construction, reconstruction, alterations and demolition. a. (1) Except as otherwise provided in paragraph two of this subdivision a, it shall be unlawful for any person in charge of a landmark site or an improvement parcel or portion thereof located in an historic district or any part of an improvement containing an interior landmark to alter, reconstruct or demolish any improvement constituting a part of such site or constituting a part of such parcel and located within such district or containing an interior landmark, or to construct any improvement upon land embraced within such site or such parcel and located within such district, or to cause or permit any such work to be performed on such improvement or land, unless the commission has previously issued a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed authorizing such work, and it shall be unlawful for any other person to perform such work or cause same to be performed, unless such certificate or notice has been previously issued.

(2) The provisions of paragraph one of this subdivision a shall not apply to any improvement mentioned in subdivision a of section 25-318 of this chapter, or to any city-aided project, or in cases subject to the provisions of section 25-312 of this chapter.

(3) It shall be unlawful for the person in charge of any improvement or land mentioned in paragraph one of this subdivision a to maintain same or cause or permit same to be maintained in the condition created by any work in violation of the provisions of such paragraph one.

b. (1) Except in the case of any improvement mentioned in subdivision a of section 25-318 of this chapter and except in the case of a city-aided project, no application shall be approved and no permit or amended permit for the construction, reconstruction, alteration or demolition of any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall be issued by the department of buildings, and no application shall be approved and no special permit or amended special permit for such construction, reconstruction or alteration, where required by article seven of the zoning resolution, shall be granted by the city planning commission or the board of standards and appeals, until the commission shall have issued either a certificate of no effect on protected architectural features, a certificate of appropriateness or a notice to proceed pursuant to the provisions of this chapter as an authorization for such work.

c. (1) A copy of every application or amended application for a permit to construct, reconstruct, alter or demolish any improvement located or to be located on a landmark site or in an historic district or containing an interior landmark shall, at the time of the submission of the original thereof to the department of buildings, be filed by the applicant with the commission. A copy of every application, under article seven of the zoning resolution, for a special permit for any work which includes the construction, reconstruction or alteration of any such improvement shall, at the time of the submission of such application or amended application of the city planning commission or the board of standards and appeals, as the case may be, be filed with the commission.

(2) Every such copy of an application or amended application filed with the commission shall include plans and specifications for the work involved, or such other statement of the proposed work as would be acceptable by the department of buildings pursuant to the building code. The applicant shall furnish the commission with such other information relating to such application as the commission may from time to time require.

(3) Together with the copies of such application or amended application, every such applicant shall file with the commission a request for a certificate of no effect on protected architectural features or a certificate of appropriateness in relation to the proposed work specified in such application.

§ 25-306 Determination of request for certificate of no effect on protected architectural features. a. (1) In any case where an applicant for a permit from the department of buildings to construct, reconstruct, alter or demolish any improvement on a landmark site or in an historic district or containing an interior landmark, or an applicant for a special permit from the city planning commission or the board of standards and appeals authorizing any such work pursuant to article seven of the zoning resolution, or amendments thereof, files a copy of such application or amended application with the commission, together with a request for a certificate of no effect on protected architectural features, the commission shall determine: (a) whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement on a landmark site or in an historic district or any interior architectural feature of the interior landmark upon which said work is to be done; and (b) in the case of construction of a new improvement, whether such construction would affect or not be in harmony with the external appearance of other, neighboring improvements on such site or in such district. If the commission determines such question in the negative, it shall grant such certificate; otherwise, it shall deny such request.

(2) Within thirty days after the filing of such application and request, the commission shall either grant such certificate, or give notice to the applicant of a proposed denial of such request. Upon written demand of the applicant filed with the commission after the giving of notice of a proposed denial, the commission shall confer with the applicant. The commission shall determine the request for a certificate within thirty days after the filing of such demand. If a demand is not filed within ten days after the giving of notice of the proposed denial, the commission shall determine such request within five days after the expiration of such ten-day period.

(3) In the event of a denial of such a certificate, the applicant may file with the commission a request for a certificate of appropriateness with respect to the proposed work specified in such application.

§ 25-307 Factors governing issuance of certificate of appropriateness. a. In any case where an applicant for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, or in an historic district or containing an interior landmark, files such application with the commission together with a request for a certificate of appropriateness, and in any case where a certificate of no effect on protected architectural features is denied and the applicant thereafter, pursuant to the provisions of section 25-306 of this chapter, files a request for a certificate of appropriateness, the commission shall determine whether the proposed work would be appropriate for and consistent with the effectuation of the purposes of this chapter. If the commission's determination is in the affirmative on such question, it shall grant a certificate of appropriateness, and if the commission's determination is in the negative, it shall deny the applicant's request, except as otherwise provided in section 25-309 of this chapter.

b. (1) In making such determination with respect to any such application for a permit to construct, reconstruct, alter or demolish an improvement in an historic district, the commission shall consider (a) the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, and (b) the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in such district.

(2) In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors of aesthetic, historical and architectural values and significance, architectural style, design, arrangement, texture, material and color.

(3) All determinations of the commission pursuant to this subdivision b shall be made subject to the provisions of section 25-304 of this chapter, and the commission, in making any such determination, shall not apply any regulation, limitation, determination or restriction as to the height and bulk of buildings, the area of yards, courts or other open spaces, density of population, the location of trades and industries, or location of buildings designed for specific uses, other than the regulations, limitations, determinations and restrictions as to such matters prescribed or made by or pursuant to applicable provisions of law, exclusive of this chapter; provided, however, that nothing contained in such section 25-304 or in this subdivision b shall be construed as limiting the power of the commission to deny a request for a certificate of appropriateness for demolition or alteration of an improvement in an historic district (whether or not such request also seeks approval, in such certificate, of construction or reconstruction of any improvement), on the ground that such demolition or alteration would be inappropriate for and inconsistent with the effectuation of the purposes of this chapter, with due consideration for the factors hereinabove set forth in this subdivision b.

c. In making the determination referred to in subdivision a of this section with respect to any application for a permit to construct, reconstruct, alter or demolish any improvement on a landmark site, other than a landmark, the commission shall consider (1) the effects of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done, (2) the relationship between such exterior architectural features, together with such effects, and the exterior architectural features of the landmark, and (3) the effects of the results of such work upon the protection, enhancement, perpetuation and use of the landmark on such site. In appraising such effects and relationship, the commission shall consider, in addition to any other pertinent matters, the factors mentioned in paragraph two of subdivision b of this section.

d. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish a landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest or value.

e. In making the determination referred to in subdivision a of this section with respect to an application for a permit to alter, reconstruct or demolish an improvement containing an interior landmark, the commission shall consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the interior architectural features of such interior landmark which cause it to possess a special character or special historical or aesthetic interest or value.

§ 25-308 Procedure for determination of request for certificate of appropriateness. The commission shall hold a public hearing on each request for a certificate of appropriateness. Except as otherwise provided in section 25-309 of this chapter, the commission shall make its determination as to such request within ninety days after filing thereof.

§ 25-309 Request for certificate of appropriateness authorizing demolition, alterations or reconstruction on ground of insufficient return. a. (1) Except as otherwise provided in paragraph two of this subdivision a, in any case where an application for a permit to demolish any improvement located on a landmark site or in an historic district or containing an interior landmark is filed with the commission, together with a request for a certificate of appropriateness authorizing such demolition, and in any case where an application for a permit to make alterations to or reconstruct any improvement on a landmark site or containing an interior landmark is filed with the commission, and the applicant requests a certificate of appropriateness for such work, and the applicant establishes to the satisfaction of the commission that:

(a) the improvement parcel (or parcels) which include such improvement, as existing at the time of the filing of such request, is not capable of earning a reasonable return; and

(b) the owner of such improvement:

(1) in the case of an application for a permit to demolish, seeks in good faith to demolish such improvement immediately (a) for the purpose of constructing on the site thereof with reasonable promptness a new building or other income-producing facility, or (b) for the purpose of terminating the operation of the improvement at a loss; or

(2) in the case of an application for a permit to make alterations or reconstruct, seeks in good faith to alter or reconstruct such improvement, with reasonable promptness, for the purpose of increasing the return therefrom;

the commission, if it determines that the request for such certificate should be denied on the basis of the applicable standards set forth in section 25-307 of this chapter, shall, within ninety days after the filing of the request for such certificate of appropriateness, make a preliminary determination of insufficient return.

(3) In any case where any application and request for a certificate of appropriateness mentioned in paragraph one of this subdivision a is filed with the commission with respect to an improvement, the provisions of this section shall not apply to such request if the improvement parcel which includes such improvement has received, for three years next preceding the filing of such request, and at the time of such filing continues to receive, under any provision of law (other than this chapter or section four hundred fifty-eight, four hundred sixty or four hundred seventy-nine of the real property tax law), exemption in whole or in part from real property taxation; provided, however, that the provisions of this section shall nevertheless apply to such request if such exemption is and has been received pursuant to section four hundred twenty-a, four hundred twenty-two, four hundred twenty-four, four hundred twenty-five, four hundred twenty-six, four hundred twenty-seven, four hundred twenty-eight, four hundred thirty, four hundred thirty-two, four hundred thirty-four, four hundred thirty-six, four hundred thirty-eight, four hundred forty, four hundred forty-two, four hundred forty-four, four hundred fifty, four hundred fifty-two, four hundred sixty-two, four hundred sixty-four, four hundred sixty-eight, four hundred seventy, four hundred seventy-two or four hundred seventy-four of the real property tax law and the applicant establishes to the satisfaction of the commission, in lieu of the requirements set forth in paragraph one of this subdivision a, that:

(a) The owner of such improvement has entered into a bona-fide agreement to sell an estate of freehold or to grant a term of at least twenty years in such improvement parcel, which agreement is subject to or contingent upon the issuance of the certificate of appropriateness or a notice to proceed;

(b) The improvement parcel which includes such improvement, as existing at the time of the filing of such request, would not, if it were not exempt in whole or in part from real property taxation, be capable of earning a reasonable return;

(c) Such improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is no longer engaged in pursuing such purposes; and

(d) The prospective purchaser or tenant:

(1) In the case of an application for a permit to demolish seeks and intends, in good faith either to demolish such improvement immediately for the purpose of constructing on the site thereof with reasonable promptness a new building or other facility; or

(2) In the case of an application for a permit to make alterations or reconstruct, seeks and intends in good faith to alter or reconstruct such improvement, with reasonable promptness.

b. In the case of an application made pursuant to paragraph one of subdivision a of this section by an applicant not required to establish the conditions specified in paragraph two of such subdivision, as promptly as is practicable after making a preliminary determination as provided in paragraph one of such subdivision a, the commission, with the aid of such experts as it deems necessary, shall endeavor to devise, in consultation with the applicant, a plan whereby the improvement may be (1)

preserved or perpetuated in such manner or form as to effectuate the purposes of this chapter, and (2) also rendered capable of earning a reasonable return.

c. Any such plan may include, but shall not be limited to, (1) granting of partial or complete tax exemption, (2) remission of taxes and (3) authorization for alterations, construction or reconstruction appropriate for and not inconsistent with the effectuation of the purposes of this chapter.

d. In any case where the commission formulates any such plan, it shall mail a copy thereof to the applicant promptly and in any event within sixty days after giving notice of its preliminary determination of insufficient return. The commission shall hold a public hearing upon such plan.

e. (1) If the commission, after holding a public hearing pursuant to subdivision d of this section, determines that a plan which it has formulated, consisting only of tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with such modifications as the commission deems necessary or appropriate, the commission shall deny the request of the applicant for a certificate of appropriateness and shall approve such plan, as originally formulated, or with such modifications.

(2) Such plan, as so approved, shall set forth the extent of tax exemption and/or remission of taxes deemed necessary by the commission to meet such standards.

(3) The commission shall promptly mail a certified copy of such approved plan to the applicant and shall promptly transmit a certified copy thereof to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this subdivision e, the tax commission shall grant, for the fiscal year next succeeding the date of approval of such plan, the tax exemption and/or remission of taxes provided for therein.

(4) In accordance with procedures prescribed by the regulations of the commission, it shall determine, upon application by the owner of such improvement made in advance of each such succeeding fiscal year, the amount of tax exemption and/or remission of taxes, if any, which it deems necessary, as a renewal of such plan for the ensuing year, to meet the standards set forth in subdivision b of this section, and shall promptly mail a certified copy of any approved renewal of such plan to the applicant and shall promptly transmit a certified copy of such renewal to the tax commission. Upon application made by the owner of such improvement pursuant to the provisions of paragraph five of this subdivision e, the tax commission shall grant, for such fiscal year, the tax exemption and/or remission of taxes specified in such determination.

(5) Where any such plan or a renewal thereof is approved by the commission, pursuant to the provisions of the preceding paragraphs of this subdivision e, prior to January first next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he or she files an application therefor with the tax commission between February first and March fifteenth, both dates inclusive, next preceding such fiscal year. Where any such plan or a renewal thereof is approved by the commission between January first and June thirtieth, both dates inclusive, next preceding the fiscal year to which the tax benefits of such plan or renewal thereof are applicable, the owner shall not be entitled to such benefits for such fiscal year unless he or she files an application therefor with the tax commission on or before August first of such fiscal year.

f. (1) In any case where the commission determines, after holding a public hearing pursuant to subdivision d of this section, that a plan which it has formulated, consisting in whole or in part of any proposal other than tax exemption and/or remission of taxes, meets the standards set forth in subdivision b of this section, as such plan was originally formulated, or with

such modifications as the commission deems necessary or appropriate, the commission shall approve such plan, as originally formulated, or with such modifications, and shall promptly mail a copy of same to the applicant.

(2) The owner of the improvement proposed to be benefited by such plan mentioned in paragraph one of this subdivision f may accept or reject such plan by written acceptance or rejection filed with the commission. If such an acceptance is filed, the commission shall deny the request of such applicant for a certificate of appropriateness. If a new application for a permit from the department of buildings and a new request for a certificate of appropriateness are filed, which application and request conform with such proposed plan, the commission shall grant such certificate as promptly as is practicable and in any event within thirty days after such filing.

(3) If such accepted plan consists in part of tax exemption and/or remission of taxes, the provisions of paragraphs two, three, four and five of subdivision e of this section shall govern the granting of such tax exemption and/or remission of taxes.

g. (1) Except in a case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, if

(a) The commission does not formulate and mail a plan pursuant to the provisions of subdivisions b, c, and d of this section within the period of time prescribed by such subdivision d; or

(b) The commission does not approve a plan pursuant to the provisions of subdivision e or f of this section within sixty days after the mailing of such plan to the applicant; or

(c) A plan approved by the commission pursuant to the provisions of paragraph one of subdivision f of this section is rejected by the owner of such improvement pursuant to the provisions of paragraph two of such subdivision;

the commission may, within ten days after expiration of the applicable period referred to in subparagraphs (a) and (b) of this paragraph one, or within ten days after the filing of a rejection of a plan pursuant to paragraph two of subdivision f of this section, as the case may be, transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel which includes the improvement with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(2) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not:

(a) Give notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission; or

(b) Enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended or agreed upon;

the commission shall promptly grant, issue and forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

h. No plan which consists in whole or in part of the granting of a partial or complete tax exemption or remission of taxes pursuant to the provisions of this chapter shall be deemed to have been approved by the commission unless it is also approved by the board of estimate within the period of time prescribed by this section for approval of such plan by the commission.

i. (1) In any case where the applicant is required to establish the conditions set forth in paragraph two of subdivision a of this section, as promptly as is practicable after making a preliminary determination with respect to such conditions, as provided in paragraph one of subdivision a of this section, and within one hundred and eighty days after making such preliminary determination, the commission, alone or with the aid of such persons and agencies as it deems necessary and whose aid it is able to enlist, shall endeavor to obtain a purchaser or tenant (as the case may be) of the improvement parcel or parcels with respect to which the application has been made, which purchaser or tenant will agree, without condition or contingency relating to the issuance of a certificate of appropriateness or notice to proceed and subject to the provisions of paragraph three of this subdivision i, to purchase or acquire an interest identical with that proposed to be acquired by the prospective purchaser or tenant whose agreement is the basis of the application, on reasonably equivalent terms and conditions.

(2) The applicant shall, within a reasonable time after notice by the commission that it has obtained such a purchaser or tenant, which notice shall be served within the period of one hundred and eighty days provided by paragraph one of this subdivision i, enter into such agreement to sell or lease (as the case may be) with the purchaser or tenant so obtained. Such notice shall specify a date for the execution of such agreement, which may be postponed by the commission at the request of the applicant.

(3) The provisions of this section shall not, after the consummation of such agreement, apply to such purchaser or tenant or to the heirs, successors or assigns of such purchaser or tenant.

(4) (a) If, within the one hundred eighty day period following the commission's preliminary determination pursuant to paragraph one of subdivision a of this section, the commission shall not have succeeded in obtaining a purchaser or tenant of the improvement parcel, pursuant to paragraph one of this subdivision i, or if, having obtained such a purchaser or tenant, such purchaser or tenant fails within the time provided in paragraph two of this subdivision i, to enter into the agreement provided for by such paragraph two, the commission, within twenty days after the expiration of the one hundred eighty day period provided for in paragraph one of this subdivision i, or within twenty days after the date upon which a purchaser or tenant obtained by the commission pursuant to the provisions of such paragraph one fails to enter into the agreement provided for by said paragraph, whichever of said dates later occurs, may transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel or parcels which include the improvement or are part of the landmark site with respect to which the request for a certificate of appropriateness was filed, and shall promptly notify the applicant of such action.

(b) If, within ninety days after transmission of such recommendation, or, if no such recommendation is transmitted, within ninety days after the expiration of the period herein prescribed for such transmission, the city does not give notice, pursuant to section three hundred eighty-two of the charter, of an application to condemn such interest or any other appropriate protective interest agreed upon by the mayor and the commission, or does not enter into a contract with the owner of such improvement parcel to acquire such interest, as so recommended and agreed upon; the commission shall promptly grant, issue and

forward to the owner, in lieu of the certificate of appropriateness requested by the applicant, a notice to proceed.

(5) Such notice to proceed shall authorize the work of demolition, alteration, and/or reconstruction sought with respect to the improvement parcel or parcels concerning which the application was made, only if such work (a) is undertaken and performed by the purchaser or tenant specified pursuant to the provisions of paragraph two of subdivision a of this section, in the application, or a bona-fide assignee, successor, lessee or sub-lessee of such purchaser or tenant (other than the owner who made application therefor), and (b) is undertaken and performed with reasonable promptness after the issuance of such notice to proceed.

§ 25-310 Regulation of minor work. a. (1) Except as otherwise provided in section 25-312 of this chapter, it shall be unlawful for any person in charge of an improvement located on a landmark site or in an historic district or containing an interior landmark to perform any minor work thereon, or to cause or permit such work to be performed, and for any other person to perform any such work thereon or cause same to be performed, unless the commission has issued a permit, pursuant to this section, authorizing such work.

(2) It shall be unlawful for any person in charge of any such improvement to maintain same or cause or permit same to be maintained in the condition created by any work done in violation of the provisions of paragraph one of this subdivision a.

b. The owner of an improvement desiring to obtain such a permit, or any person authorized by the owner to perform such work, may file with the commission an application for such permit, which shall include such description of the proposed work, as the commission may prescribe. The applicant shall submit such other information with respect to the proposed work as the commission may from time to time require. The commission shall promptly transmit such application to the department of buildings, which shall, as promptly as is practicable, certify to

the commission whether a permit for such proposed work, issued by such department, is required by law. If such department certifies that such a permit is required, the commission shall deny such application, and shall promptly give notice of such determination to the applicant. If such department certifies that no such permit is required, the commission shall determine such application as hereinafter provided.

c. (1) The commission shall determine:

(a) Whether the proposed work would change, destroy or affect any exterior architectural feature of an improvement located on a landmark site or in an historic district or interior architectural feature of an improvement containing an interior landmark; and

(b) If such work would have such effect, whether judged by the standards set forth in subdivisions b, c, d and e of section 25-307 of this chapter with respect to an improvement of similar classification hereunder, such work would be appropriate for and consistent with the effectuation of the purposes of this chapter.

(2) If the commission determines the question set forth in subparagraph (a) of paragraph one of this subdivision c in the negative, or determines the question set forth in subparagraph (b) of such paragraph in the affirmative, it shall grant such permit, and it shall deny such permit if it determines such question set forth in subparagraph (a) in the affirmative and determines such question set forth in subparagraph (b) in the negative.

d. The procedure of the commission in making its determination with respect to any such application shall be as prescribed in subparagraph two of subdivision a of section 25-306 of this chapter, except that any period of thirty days referred to in such subparagraph shall, for the purposes of this subdivision d, be deemed to be twenty days.

e. The provisions of this section shall be inapplicable to any improvement mentioned in subdivision a of section 25-318 of this chapter and to any city-aided project.

§ 25-311 Maintenance and repair of improvements. a. Every person in charge of an improvement on a landmark site or in an historic district shall keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof which, if not so maintained, may cause or tend to cause the exterior portions of such improvement to deteriorate, decay or become damaged or otherwise to fall into a state of disrepair.

b. Every person in charge of an improvement containing an interior landmark shall keep in good repair (1) all portions of such interior landmark and (2) all other portions of the improvement which, if not so maintained, may cause or tend to cause the interior landmark contained in such improvement to deteriorate, decay or become damaged or otherwise fall into a state of disrepair.

c. Every person in charge of a scenic landmark shall keep in good repair all portions thereof.

d. The provisions of this section shall be in addition to all other provisions of law requiring any such improvement to be kept in good repair.

§ 25-312 Remedying of dangerous conditions. a. In any case where the department of buildings, the fire department or the department of health, or any officer or agency thereof, or any court on application or at the instance of any such department, officer or agency, shall order or direct the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in an historic district or containing an interior landmark, or the performance of any minor work upon such improvement, for the purpose of remedying conditions determined to be dangerous to life, health or property, nothing contained in this chapter shall be construed as making it

unlawful for any person, without prior issuance of a certificate of no effect on protected architectural features or certificates of appropriateness or permit for minor work pursuant to this chapter, to comply with such order or direction.

b. The department of buildings, fire department or department of health, as the case may be, shall give the commission as early notice as is practicable, of the proposed issuance or issuance of any such order or direction.

§ 25-313 Public hearings; conferences. a. The commission shall give notice of any public hearing which it is required or authorized to hold under the provisions of this chapter by publication in the City Record for at least ten days immediately prior thereto.

The owner of any improvement parcel on which a landmark or a proposed landmark is situated or which is a part of a landmark site or proposed landmark site or which contains an interior landmark or proposed interior landmark, or any property which includes a scenic landmark or proposed scenic landmark shall be given notice of any public hearing relating to the designation of such proposed landmark, landmark site, interior landmark or scenic landmark, the amendment to any designation thereof or the proposed rescission of any designation or amendment thereto. Such notice may be served by the commission by registered mail addressed to the owner or owners at his or her or their last known address or addresses, as the same appear in the records of the office of the commissioner of finance or if there is no name in such records, such notice may be served by ordinary mail addressed to "Owner" at the street address of the improvement parcel or property in question. Failure by the commission to give such notices shall not invalidate or affect any proceedings pursuant to this chapter relating to such improvement parcel or property.

b. At any such public hearing, the commission shall afford a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard, and may, in its discretion, take the testimony of witnesses and receive evidence; provided, however, that the commission, in determining any matter as to which any such hearing is held, shall not be confined to consideration of the facts, views, testimony or evidence submitted at such hearing.

c. The commission may delegate to any member or members thereof the power to conduct any such public hearing and to hold any conference required to be held under the provisions of sections 25-306 and 25-310 of this chapter.

d. The commission, may, in its discretion, direct that notice of any such public hearing on a request for a certificate of appropriateness, or on any plan formulated by the commission in relation thereto, be given by the applicant to such owners of property in the neighborhood of the improvement or improvement parcel to which such request relates, as the commission deems proper. When so directed, the applicant shall mail a notice of such hearing to such owners, at their last known addresses, as the same appear in the records of the office of the commissioner of finance, and shall likewise mail a notice of such hearing to persons who have filed written requests for such notice with the commission. A reasonable period of time, as prescribed by the regulations of the commission, shall be afforded the applicant for giving notice of such hearing to such owners and persons. Any failure to give or receive such notice shall not invalidate any such hearing or any determination made by the commission with respect to such request for a certificate or with respect to such plan.

§ 25-314 Extension of time for action by commission.
Whenever, under the provisions of this chapter, the commission is required or authorized, within a prescribed period of time, to make any determination or perform any act in relation to any request for a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor

work, the applicant may extend such period of time by his or her written consent filed with the commission.

§ 25-315 Determinations of the commission; notice thereof. a. Any determination of the commission granting or denying a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work shall set forth the reasons for such determination.

b. The commission shall promptly give notice of any such determination, and of any preliminary determination of insufficient return made pursuant to paragraph one of subdivision a of section 25-309 of this chapter, to the applicant. Such notice shall include a copy of such determination.

c. Subject to the provisions of section 25-304 of this chapter, any determination of the commission granting a certificate of no effect on protected architectural features, a certificate of appropriateness or a permit for minor work may prescribe conditions under which the proposed work shall be done, in order to effectuate the purposes of this chapter, and may include recommendations by the commission as to the performance of such work, provided that the provisions of this subdivision shall not apply to any notice to proceed granted pursuant to the provisions of subdivisions g and i of section 25-309 of this chapter.

§ 25-316 Transmission of certificates and applications to proper city agency. In any case where a certificate of no effect on protected architectural features, certificate of appropriateness or notice to proceed is granted by the commission to an applicant who has filed with the commission a copy of an application for a permit from the department of buildings, the commission shall transmit such certificate or a copy of such notice to the department of buildings. In any case where any such certificate or notice is granted to an applicant who has filed an application for a special permit with the city planning commission or the board of standards and appeals pursuant to article seven of the zoning resolution, the commission shall transmit such

certificate or a copy of such notice to the planning commission or the board of standards and appeals, as the case may be.

§ 25-317 Penalties for violations; enforcement. a. Any person who violates any provision of subdivision a of section 25-305 of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars and not less than one hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

b. Any person who violates any provision of subdivision a of section 25-310 of this chapter or any provision of section 25-311 shall be punished, for a first offense, by a fine of not more than two hundred and fifty dollars or less than twenty-five dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment, and shall be punished for a second, or any subsequent offense, by a fine of not more than five hundred dollars or less than one hundred dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment.

c. Any person who files with the commission any application or request for a certificate or permit and who refuses to furnish, upon demand by the commission, any information relating to such application or request, or who wilfully makes any false statement in such application or request, or who, upon such demand, willfully furnishes false information to the commission, shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than ninety days, or by both such fine and imprisonment.

d. For the purpose of this chapter, each day during which there exists any violation of the provisions of paragraph three of subdivision a of section 25-305 of this chapter or paragraph two of subdivision a of section 25-310 of this chapter or any violation of the provisions of section 25-311 of this chapter, shall constitute a separate violation of such provisions.

e. Whenever any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter mentioned in subdivisions a and b of this section, the commission may make application to the supreme court for an order enjoining such act or practice, or requiring such person to remove the violation or directing the restoration, as nearly as may be practicable, of any improvement or any exterior architectural feature thereof or improvement parcel affected by or involved in such violation, and upon a showing by the commission that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction, restraining order or other appropriate order shall be granted without bond.

§ 25-318 Reports by commission on plans for proposed projects. a. Plans for the construction, reconstruction, alteration or demolition of any improvement or proposed improvement which:

(1) is owned by the city or is to be constructed upon property owned by the city; and

(2) is or is to be located on a landmark site or in an historic district or contains an interior landmark;

shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within forty-five days after such referral.

b. (1) No officer or agency of the city whose approval is required by law for the construction or effectuation of a city-aided project shall approve the plans or proposal for, or application for approval of, such project, unless, prior to such approval, such officer or agency has received from the commission a report on such plans, proposal or application for approval.

(2) All such plans, proposals or applications for approval shall be referred to the commission for a report thereon before consideration of approval thereof is undertaken by any such officer or agency, and the commission shall submit its report to each such officer and agency and such report shall be published in the City Record within forty-five days after such referral.

c. Except as provided in subdivision d of section 25-303, where the commission so requests, plans for the construction, reconstruction, alteration or demolition of any landscape feature of a scenic landmark shall, prior to city action approving or otherwise authorizing the use of such plans with respect to securing the performance of such work, be referred by the agency of the city having responsibility for the preparation of such plans to the commission for a report. Such report shall be submitted to the mayor, the city council and to the agency having such responsibility and shall be published in the City Record within forty-five days after such referral. No such report shall recommend disapproval of any such plans where land contour work or earthwork is necessary in order to conform with applicable laws concerning regulation of lots, storm water disposal and water courses. The commissioner of parks and recreation may request an advisory report concerning work proposed to be performed on, or in the vicinity of, a scenic landmark, and such report shall be published in the City Record.

§ 25-319 Regulations. The commission may from time to time promulgate, amend and rescind such regulations as it may deem necessary to effectuate the purposes of this chapter, including, but not limited to, regulations:

(a) for the protection, preservation, enhancement, and perpetuation and use of landmarks, interior landmarks, scenic landmarks and historic districts, subject to the provisions of section 25-304 of this chapter. Such regulations may apply to one or more historic districts or to one or more portions of an historic district and may vary from area to area in their provisions;

(b) relating to the determination of the earning capacity of improvement parcels by the commission pursuant to section 25-309 of this chapter;

(c) relating to the procedures of the commission in carrying out its functions, powers and duties under this chapter, including procedures for the giving of notice by the commission by mail or otherwise, where notice is required by this chapter; and

(d) relating to forms to be used in proceedings before the commission.

§ 25-320 Investigations and reports. The commission may make such investigations and studies of matters relating to the protection, enhancement, perpetuation or use of landmarks, interior landmarks, scenic landmarks and historic districts, and to the restoration of landmarks, interior landmarks, scenic landmarks and buildings in historic districts as the commission may, from time to time, deem necessary or appropriate for the effectuation of the purposes of this chapter, and may submit reports and recommendations as to such matters to the mayor and other agencies of the city. In making such investigations and studies, the commission may hold such public hearings as it may deem necessary or appropriate.

§ 25-321 Applicability. The provisions of this chapter shall be inapplicable to the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in a historic district or containing an interior landmark, or of any landscape feature of a scenic landmark, where a permit for the performance of such work was issued by the department of buildings, or, in the case of a landscape feature of a scenic landmark, where plans for such work have been approved, prior to the effective date of the designation, or amended or modified designation, pursuant to the provisions of section 25-303 of this chapter, first making the provisions of this chapter applicable to such improvement or landscape feature or to the improvement parcel or property in which such improvement or landscape feature is or is to be located.

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Supreme Court, U.S.
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**No. 90-900
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990**

**THE RECTOR, WARDENS AND MEMBERS OF
THE VESTRY OF ST. BARTHOLOMEW'S
CHURCH,**

Petitioners,

-against-

**THE CITY OF NEW YORK AND THE
LANDMARKS PRESERVATION COMMISSION
OF THE CITY OF NEW YORK,**

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO A
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

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of Counsel.**

February 1, 1991

***Attorney of Record**

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

This Court upheld the constitutionality of the New York City Landmarks Law in Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). Under the Landmarks Law, when a building is designated as a landmark, a tax exempt owner may obtain hardship relief if it shows that it can no longer use its historic building. The Courts below determined that petitioner could house all its desired activities in the Community House and, therefore, did not need to demolish this landmark structure.

1. Does the First Amendment require that all buildings owned by religious institutions be exempted from the Landmarks Law?

2. Does the denial of petitioner's application for hardship relief violate the Fifth Amendment?

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COUNTY OF DALLAS

IN SENATE

January 1, 1901

BY SENATOR

JOHN W. HANCOCK

OF THE

SEVENTH LEGISLATURE

OF THE STATE OF TEXAS

1901

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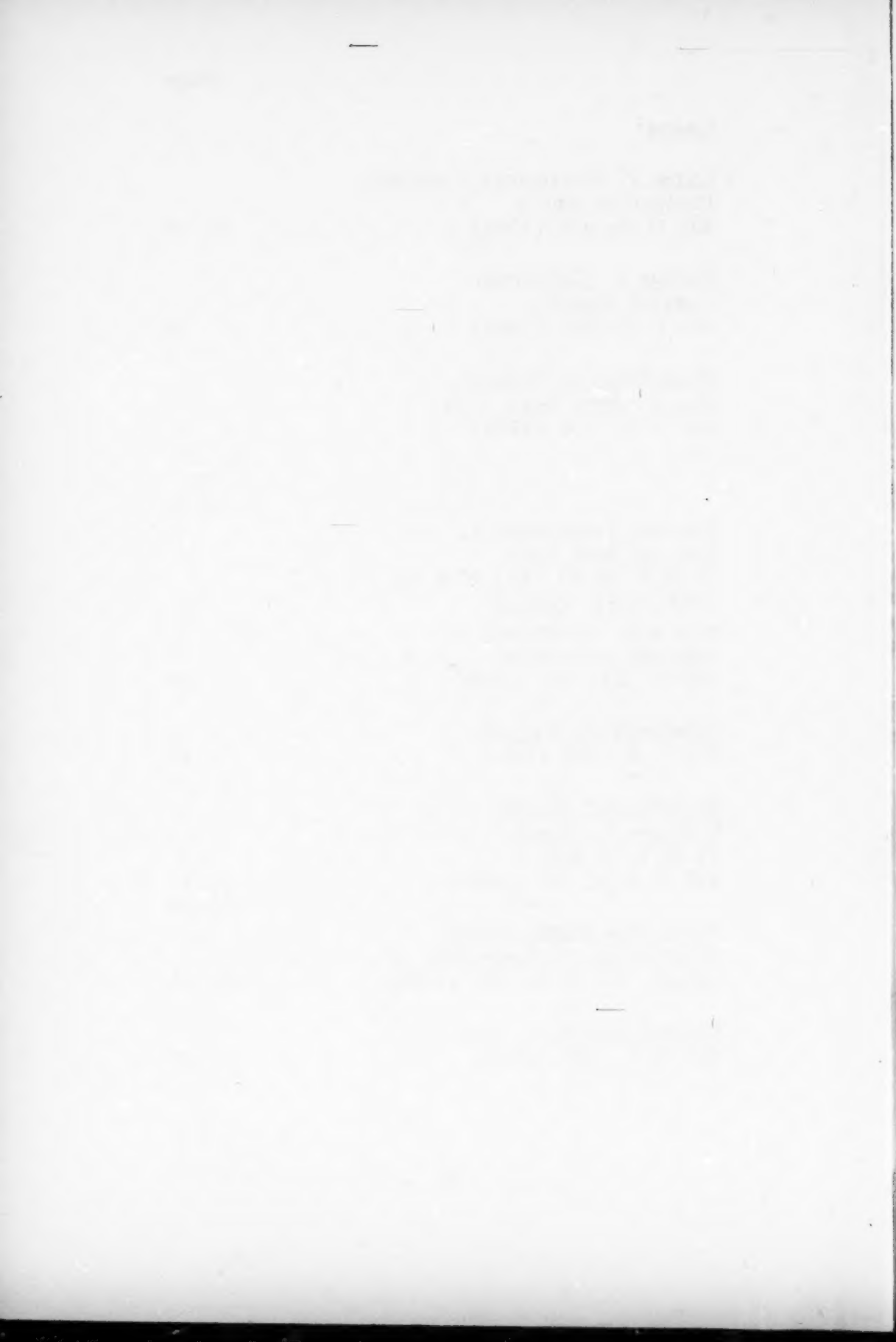
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No. 90-900

IN THE
SUPREME COURT OF THE UNITED STATES
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THE RECTOR, WARDENS AND MEMBERS OF
THE VESTRY OF ST. BARTHOLOMEW'S
CHURCH,

Petitioners,

-against-

THE CITY OF NEW YORK AND THE
LANDMARKS PRESERVATION COMMISSION
OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION
TO A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

The New York City Landmarks
Preservation Commission ("the Commission")
designated the exterior of St. Bartholomew's
Church and Community House and its

terraces and gardens as a landmark in March 1967. The Commission found that "St. Bartholomew's Church and Community House have a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural aspects of New York City" (A-5).¹ See New York City Administrative Code ("Admin. Code") §§25-302[n], 25-303.

A special proceeding to review the Commission's designation is readily available in the New York Courts for owners who contend that their property is not of landmark quality. See Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922 (1980). The Church never

¹ References to the Appendix to the petition are cited as (A-). References to the Joint Appendix in the Court of Appeals are cited as (JA-). References to the Appendix in the District Court are to the volume number followed by the page number, i.e. (10/541).



challenged any part of the designation in court (A-28).

The Landmarks Preservation Commission is not empowered to designate an interior space used as a place of religious worship. Admin. Code §25-303[a](2). A building designated as a landmark may not be altered or demolished without obtaining a permit from the Commission. Admin. Code §25-305(a)(1).

In December 1983, petitioner filed the first of two applications for permission to demolish the Community House and replace it with an office tower. Petitioner first proposed building a 59 story office tower (A-6). After the Commission unanimously denied the application, petitioner submitted revised plans for a 47 story office tower. Most of the building would be leased as commercial space while the basement would be used as a new Community House (JA-15, 288). The Commission unanimously rejected

the Commission was to study the organization

of the service

in connection with the proposed new

arrangement of the service in the future

and to make a report to the Commission

in the form of a memorandum

to be submitted to the Commission

in the form of a memorandum

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the new design because it was inappropriate to the landmark (JA-606).

Petitioner then applied for permission to build the 47 story office tower in place of the Community House on the ground of relief from hardship (A-6). As a tax exempt property owner, petitioner could obtain hardship relief "where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the [owner's] charitable purpose." Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 455, 415 N.E.2d 922, 925 (1980).

The Commission considered the application at a series of public hearings and public executive sessions (A-6-7). The Commission unanimously determined that petitioner did not meet the standard for hardship relief because the evidence showed that the Community House had sufficient space for all the functions petitioner wanted

to devote it to, the Community House could easily be reconfigured to make the changes petitioner wanted, it made economic sense to repair the Community House and petitioner could afford to make any necessary repairs (JA-820-73).

Petitioner then brought this proceeding alleging, inter alia, that the Landmarks Law violated its rights under the First and Fifth Amendments (A-7). The District Court determined that the Landmarks Law was constitutional on its face and, after a bench trial limited to the 23 volume record of proceedings before the Commission, held that the Landmarks Law was constitutional as applied. The Court of Appeals affirmed.

1. The District Court Opinion

The District Court found the Landmarks Law facially constitutional as against the First Amendment challenge because it did not coerce religious beliefs or penalize religious activity (A-32). The Court also held that

the Landmarks Law and Commission proceedings comport with due process because property owners receive adequate notice and "the opportunity for an extensive hearing" (A-35).

The Court rejected the Church's taking claim, relying on Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978). Because the Community House is not a profit making property, the Court determined that petitioner could prove a taking had occurred "where the landmark designation would prevent or seriously interfere with the carrying out of the charitable purpose of the institution" (A-39-40).

Reviewing the record, the District Court found that landmark designation did not interfere with petitioner's purpose in using the Community House. The Church argued that the Community House was too small to support Church activities. The

the President has the honor to
acknowledge the receipt of your letter
of the 10th inst. and in reply to
inform you that the same has been
forwarded to the proper authorities
for their consideration. The
President is very anxious to
have the matter settled as soon as
possible, and will be glad to
hear from you again when you
hear from the authorities.
Very respectfully,
John F. Kennedy

Court found these claims "incorrect" and "unsupported by any evidence" (A-42, 43). The Church claimed it would cost \$11 million to repair the Community House. The Court completely rejected the report the Church relied on finding "it is clear ... that their object was not to determine what repairs were truly necessary or required, but to maximize the amount of work and the cost of that work." (A-48). The Court found that repairs would cost approximately three million dollars and that this was an objectively reasonable amount to spend given the market value of the property (A-52, 56).

The Court rejected the Church's claim that the landmark designation had diminished the value of the property by 80% by finding that the property's transferable development rights were a valuable property interest that could be exploited by the Church (A-55-56). Finally, the Court rejected the Church's claims that it could not afford to make the

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repairs. The Court found that the work did not have to be done all at once as the Church had claimed, that the Church had operated at close to break even point without distinguishing capital and operating expenses for the previous ten years and while spending over \$1.6 million on its development plans and the Church had not explored either selling its valuable air rights or mounting a fund raising campaign to augment its \$12.5 million endowment (A-52-56).

2. The Court of Appeals Opinion

The Court of Appeals, in an opinion by Judge Winter, rejected petitioner's argument that because it was a religious institution, it had a First Amendment right to exemption from the the Landmarks Law in order to raise money. Relying on this Court's decisions interpreting the Free Exercise Clause, the Court of Appeals held that the Church's free exercise claim depended on the

nature of the Landmarks Law, not solely on the law's effect on the Church (A-11): "The critical distinction is ... between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously motivated."

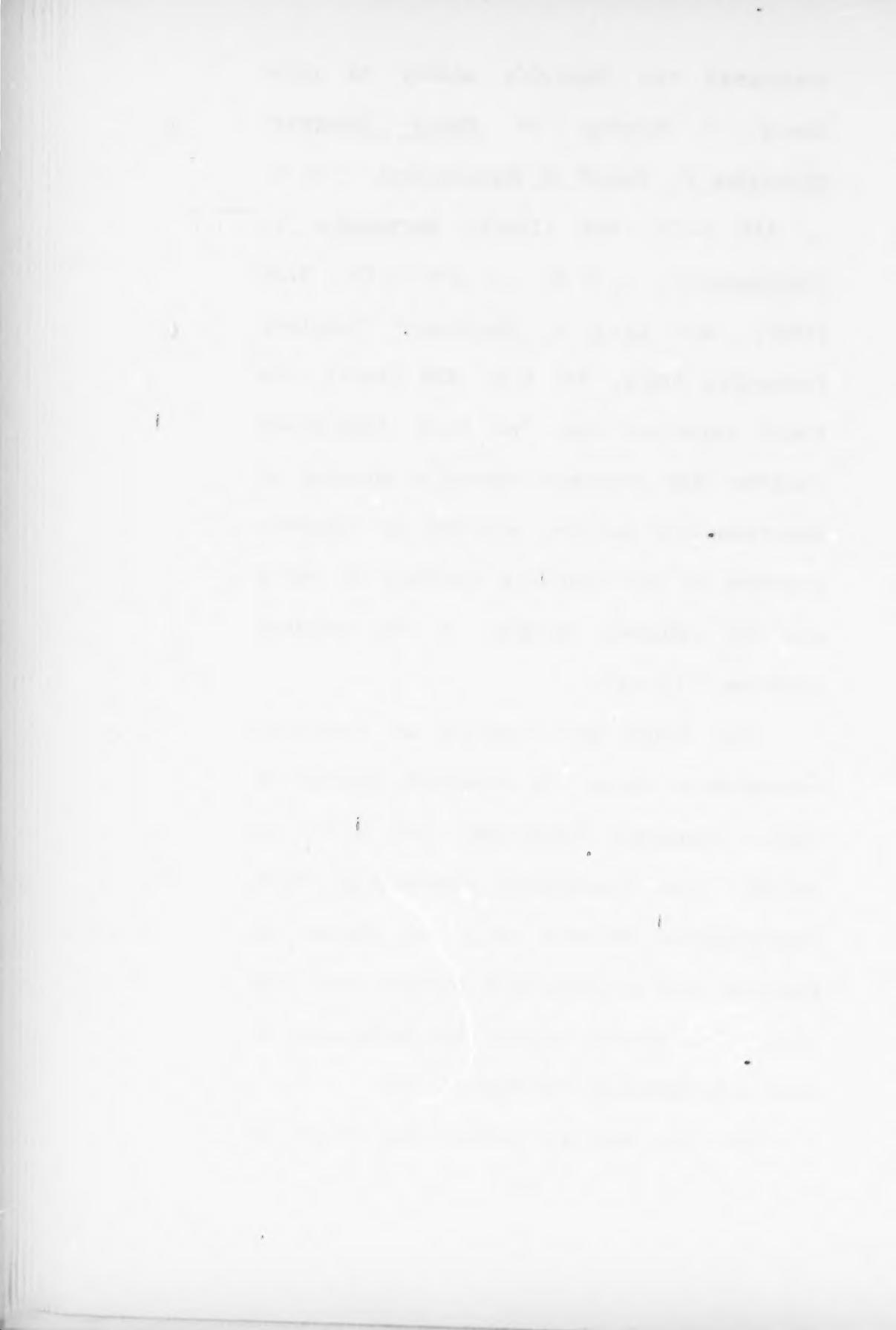
Explaining that this Court, in Penn Central, 438 U.S. at 132, had already rejected petitioner's argument that the Landmarks Law was not a general law because it regulated individual properties and noting the similarity between zoning and the Landmarks Law (A-12-13), the Court of Appeals held that the Landmarks Law "is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions" (A-11).

Because the Landmarks Law is a neutral law, the Court rejected petitioner's argument that the law was rendered invalid if it

diminished the Church's ability to raise money. Relying on Jimmy Swaggart Ministries v. Board of Equalization, _ U.S. _, 110 S.Ct. 688 (1990), Hernandez v. Commissioner, _ U.S. _, 109 S.Ct. 2136 (1989), and Lyng v. Northwest Cemetery Protective Ass'n, 485 U.S. 439 (1988), the Court explained that "no First Amendment violation has occurred absent a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities." (A-14).

The Court also rejected an excessive entanglement claim. It reasoned, relying on Jimmy Swaggart Ministries, 110 S.Ct. at 697-99, that Commission proceedings were constitutional because they are limited to financial and architectural matters and only occur if a church applies for permission to alter a landmarked building (A-14).

On the takings claim, the Court of



Appeals found that this case was indistinguishable from Penn Central, 438 U.S. 104 (1978). The Court stated (A-16):

In that case, the Landmarks Law diminished the opportunity for Penn Central to earn what might have been substantial amounts by preventing it from building a skyscraper atop the Terminal. Here it prevents a similar development by the Church -- one that, in contrast to the proposal to build an office tower over Grand Central Terminal, would involve the razing of a landmarked building -- at least so long as the Church is able to continue its present activities in the existing buildings.

Accordingly, the Court found no taking had occurred.

The Court of Appeals affirmed all the District Court's factual findings. The Court rejected the Church's claim that the Community House had no space for desired activities (A-19):

Fatal, however, to the Church's claim is the absence of any showing that the space deficiency in the Community House cannot be remedied by a reconfiguration or expansion that is consistent with the purposes of the Landmarks

Law.... Certainly the intermediate option of limited expansion must be thoroughly explored before jumping to replacement with a forty-seven story office building.

The Court noted that the Church on appeal had abandoned its previous claim that repairs would cost \$11 million and now argued that repairs would cost \$4.5 million (A-20). The Court found that even if the Church's claims were accurate, the Church offered no evidence to show "that it is unable to meet this expense" (A-21). The Court also affirmed the District Court's finding that the transferable development rights were valuable (A-22). Accordingly, the Court of Appeals affirmed the District Court's holding that petitioner did not prove that its constitutional rights were violated.

REASONS FOR DENYING THE WRIT

This Court should only review this case if it would find that the Constitution exempts all properties owned by religious organizations from land use regulation. If

such properties are properly subject to regulation, then the factual findings of the lower courts and the Landmarks Commission that petitioner can continue to house its activities in the landmark Community House require the conclusion that there has been no constitutional violation. The courts below specifically rejected petitioner's claim that designation of the Community House as a landmark has forced it to maintain a building "ill-suited to [its] needs and costly to maintain and repair" (Petition at 7). The District Court found those claims "incorrect" and "unsupported by the evidence" (A-42, 43, 48, 52) and the Court of Appeals affirmed the findings of fact (A-18-22).²

² Nor is this a case where designation of a property as a landmark destroyed 80% of the property's value (Petition at i). That figure is based on the assumption that the property cannot be developed. Both Courts below found as fact that this assumption is untrue (A-22, 55-56). See infra at Point Two.

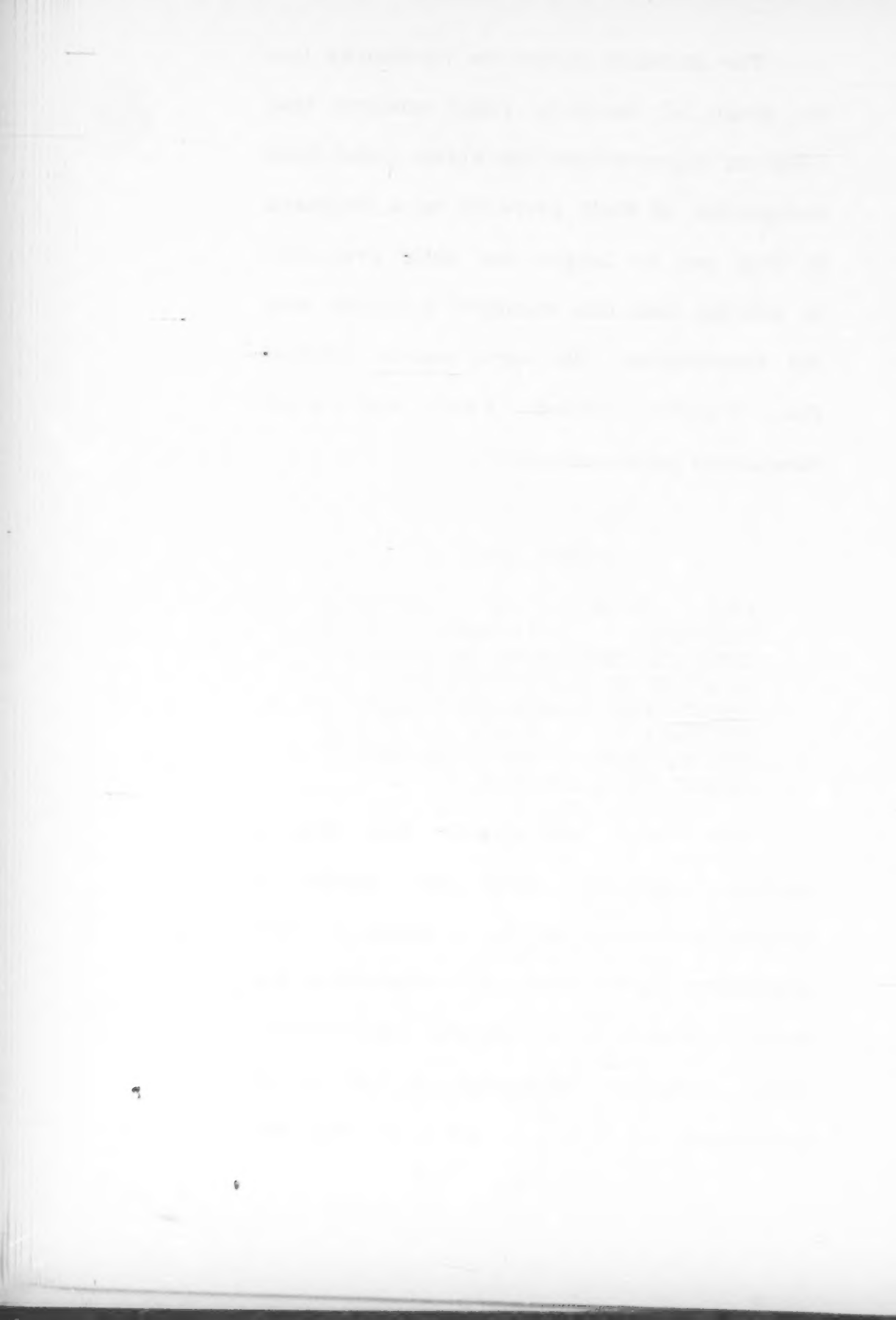


The standard under the Landmarks Law for grant of hardship relief ensures that religious organizations can obtain relief from designation of their property as a landmark if they can no longer use their property. In holding that this standard comports with the Constitution, the lower courts followed this Court's settled First and Fifth Amendment jurisprudence.

POINT ONE

THE COURT OF APPEALS
PROPERLY FOLLOWED THIS
COURT'S DECISIONS IN HOLDING
THAT IT IS CONSTITUTIONAL TO
APPLY THE LANDMARKS LAW, A
NEUTRAL LAND USE
REGULATION, TO PROPERTY
OWNED BY A CHURCH.

This Court has already held that a neutral regulation does not impose a substantial burden on the exercise of First Amendment rights although it diminishes the money available to a religious organization. Jimmy Swaggart Ministries v. Board of Equalization, __ U.S. __, 110 S.Ct. 688, 696



(1990); Hernandez v. Commissioner, — U.S.—, 109 S.Ct. 2136, 2149 (1989). In Swaggart this Court unanimously upheld a tax on sales of religious items by the Jimmy Swaggart Ministries, although it cut into the amount of money the Ministries could spend on religious purposes. This Court explained: "At bottom, though we do not doubt the economic cost to appellant of complying with a generally applicable sales and use tax, such a tax is no different from other generally applicable laws and regulations -- such as health and safety regulations -- to which appellant must adhere." 110 S.Ct. at 696.

Because generally applicable laws that do not regulate religious beliefs do not "burden the claimant's freedom to exercise religious rights," Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 303 (1985), they do not require justification by reference to a compelling

state interest. Hernandez, 109 S.Ct. at 2148; Sherbert v. Verner, 374 U.S. 398, 403 (1963). Thus, even before its decision in Employment Division v. Smith, this Court had already rejected the argument advanced by petitioner and its amici: that there is a First Amendment right to maximize a religious organization's income because the money would be spent for religious purposes.³ In Smith this Court reaffirmed its view that general laws that do not coerce

³ Petitioner relies on a recent decision of the Washington State Supreme Court, First Covenant Church of Seattle v. City of Seattle, 114 Wash.2d 392, 787 P.2d 1352 (1990), which struck down a landmarks preservation law as applied to a church. The majority neither cited nor relied on this Court's decisions in Smith, Swaggart and Hernandez, and therefore failed to determine whether a law of general application imposed a substantial burden. The concurring Judges noted this deficiency and suggested that a landmark designation should be struck down only if the Church cannot use the landmark building for its religious purposes. As the Court of Appeals held, New York City's Landmarks Law satisfies this test.

religious beliefs are valid although they may forbid conduct associated with religious beliefs. Employment Division v. Smith, 110 S.Ct. at 1600. United States v. Lee, 455 U.S. 252 (1982); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

The Landmarks Law is a facially neutral land use regulation. This Court has stated that the law "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city...." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 132 (1978). Thus, this Court has previously rejected the argument that the Landmarks Law is not a generally applicable law because not all properties are important enough to be landmarked. Penn Central, 438 U.S. at 132.

The law does not regulate religious beliefs. As the Court of Appeals summarized

the claims made before it (A-11): "No one seriously contends that the Landmarks Law interferes with substantive religious views." While petitioner argues that a disproportionate number of religious buildings have been landmarked, the Court of Appeals rejected the claim of discrimination as factually unsupported. It found "no evidence of an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites" (JA-12).

The Landmarks Law regulates religious institutions in their secular guise as property owners. Like a zoning law,⁴ the Landmarks Law restricts a property owner's

⁴ The Circuit Courts of Appeal have held that zoning laws may be applied to properties owned by religious institutions. Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir.), cert. denied, 469 U.S. 827 (1983); Lakewood Ohio Congregation of Jehova's Witnesses, 699 F.2d 303 (6th Cir.), cert. denied, 464 U.S. 815 (1983).

The above words belong to (A 11). "He was

carefully watching that the language was

instructed with sufficient religious ideas."

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ability to devote its property to the most lucrative possible use. This effect is constitutional when a secular property owner's property is landmarked. Penn Central, 438 U.S. 104. The First Amendment does not require a different outcome when the property is owned by a religious institution. See Swaggart, 110 S.Ct. at 696; Hernandez, 109 S.Ct. at 2149.

The New York hardship standard ensures that the Landmarks Law cannot have so onerous an economic impact that it "might effectively choke off an adherent's religious practices." Swaggart, 110 S.Ct. at 697. Under the law as interpreted by the New York State Courts, a tax exempt owner must be given hardship relief if "maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose." Admin. Code §25-309[a](2)(c); Society for Ethical Culture v. Spatt, 51 N.Y.2d 449,

455, 415 N.E.2d 922, 925 (1980).

This standard, which the Court of Appeals held comported with the First Amendment (A-4), ensures that if a religious owner cannot maintain its activities in its landmark building, it will be given hardship relief. In addition, this standard provides a mechanism for individualized assessment of claims that operation of the law works a hardship on religious grounds. See Employment Division v. Smith, 110 S.Ct. at 1603.

When an owner applies for hardship relief on this ground, the owner describes the functions it uses the building for and the Landmarks Commission defers to the owner's statement. Thus, when petitioner applied for hardship relief the Landmarks Commission asked petitioner what activities it needed to house in the Community House and accepted the stated needs as a given (JA-306). Petitioner was denied hardship

relief only because, as the District Court found (A-42-43), there was no evidence to show that the Community House was unsuitable for all the activities petitioner housed in the building.

As the Court of Appeals held, there is no entanglement difficulty with this inquiry into objective architectural concerns. See Hernandez, 109 S.Ct. at 2147-48; Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305-06 (1985). A further inquiry into the owner's ability to afford repairs is made only if an owner chooses to argue, as petitioner did, that even if it could fit its activities into the landmark structure, it could not afford to make necessary repairs (A-4). This inquiry accommodates poor religious organizations by allowing them to obtain hardship relief even if a wealthier owner would spend the money to repair the landmark property. Again, this limited inquiry into objective financial

matters does not entangle government with religion, especially because the owner determines the scope of the Commission inquiry.⁵ See Swaggart, 110 S.Ct. at 697-99; Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

The remaining issues raised by the petition were resolved by this Court in Penn Central. This Court has already rejected the claim that Commission decision making is arbitrary, pointing to the availability of judicial review of Commission actions. Penn Central, 438 U.S. at 132-33. This Court has also already considered and rejected the argument that the Landmarks Law is invalid

⁵ The Commission has never interpreted the hardship test as authorizing it to inquire into a religious owner's spending priorities and whether it could afford the repairs by redirecting its priorities. There has been no finding by the lower courts of such an inquiry in the case at bar. While such matters were raised by dissident parishioners, they formed no part of the Commission's decision (JA-820-73).

because regulation depends on aesthetic judgment. Penn Central, 438 U.S. at 132. As in that case, the argument has "a particularly hollow ring" since petitioner never sought judicial review of the designation of the Church and the Community House.

Petitioner's failure to challenge the designation in the many years since 1967 is telling evidence that the Landmarks Law is a neutral law of general applicability that may be validly applied to properties owned by religious organizations. Because the law does not place a substantial burden on religious institutions as owners of landmark properties, it is consistent with the Free Exercise Clause.

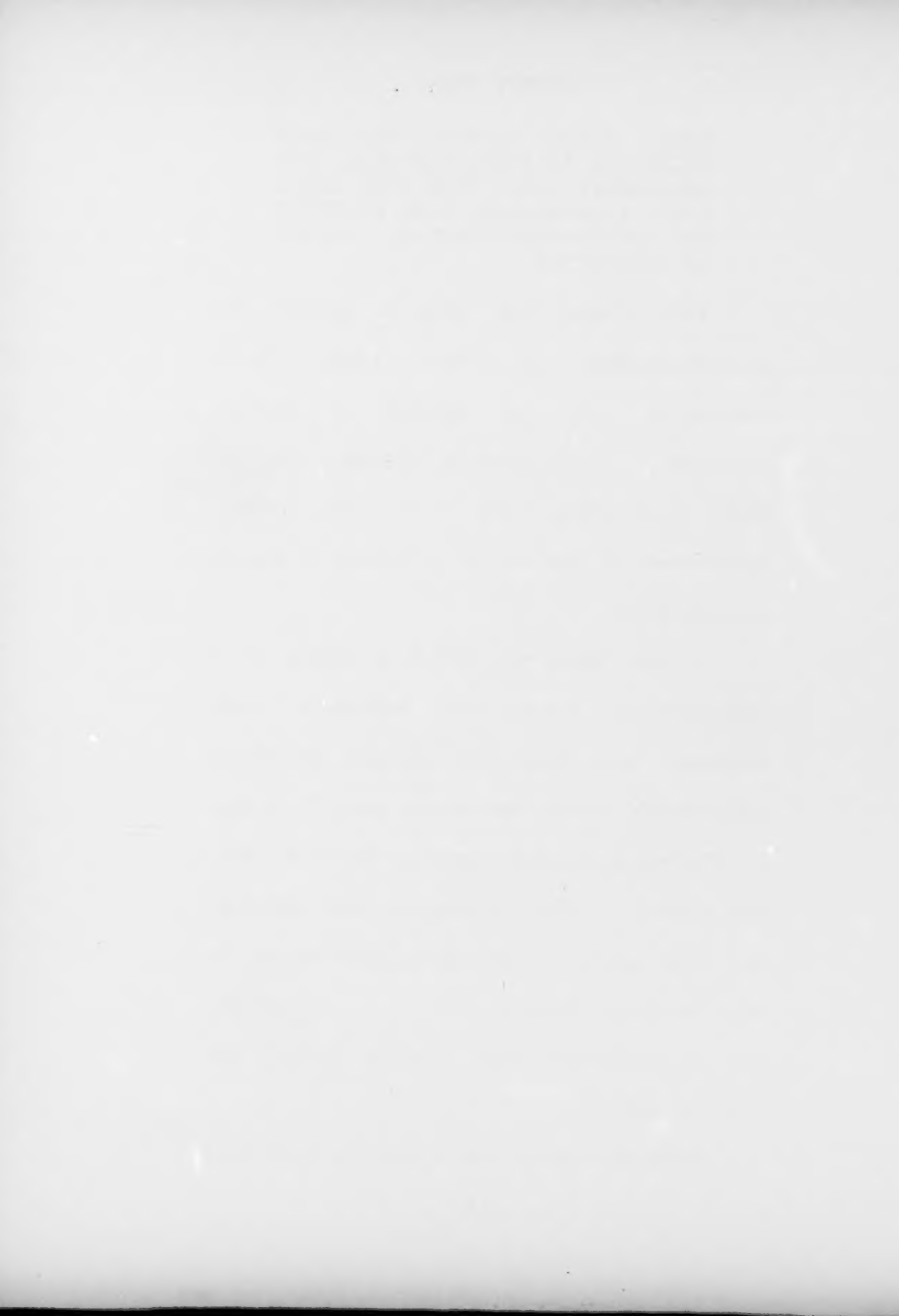
POINT TWO

THIS COURT CONSIDERED AND REJECTED IN PENN CENTRAL THE ARGUMENT THAT THE NEW YORK CITY LANDMARKS LAW EFFECTS AN UNCONSTITUTIONAL TAKING OF PROPERTY.

This Court has already upheld the constitutionality of New York City's Landmarks Law as against a takings challenge. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978). Application of the law to petitioner is surely constitutional.

A law "does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987). The Landmarks Law satisfies the first part of this test; this Court so held in Penn Central, 438 U.S. at 132-34, and it reaffirmed that view in Nollan, 483 U.S. at 834-35.

Petitioner asks this Court to hold that



the Landmarks Law deprives it of "economically viable use of its land" because it limits the Church's unfettered right to exploit its air rights and develop its property. The identical argument was raised and resoundingly rejected by the Penn Central Court: "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." 438 U.S. at 130. See also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496-99 (1987) (ban on mining certain coal does not effect a taking).⁶

⁶ This Court also rejected in Penn Central petitioner's claim that landmarks do not enjoy a reciprocity of advantage from the landmarking: "Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, ... -- (Footnote Continued)



Petitioner's claim that the landmarking deprived it of 80% of the property's value (petition at 1, 27) is contradicted by the factual findings below. This figure assumes that petitioner has lost the value of the Community House as a development property, which is untrue. Just as in Penn Central, the Commission did not "prohibit any construction," 438 U.S. at 137. The Commission has expressly stated that it does not consider the Community House "to be inviolate or unalterable" (JA-607) and the Court of Appeals noted that the Commission "invited [petitioner] to propose an addition to the Community House in the instant matter" (A-17). In addition, the Courts below found that like the property owner in Penn Central, petitioner has valuable

(Footnote Continued)

which we are unwilling to do -- we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law." 438 U.S. at 134-35.

transferable development rights available for exploitation (A-17, 22, 55-56). Petitioner's claim to the contrary (Petition at 24) was rejected as "unsupported" by the Court of Appeals (A-17).

In addition to petitioner's failure to prove that it had lost development rights retained by the owner in Penn Central, petitioner failed to prove that it was entitled to hardship relief under the New York test for tax exempt buildings adopted by the Courts below. That test is well suited to determining whether a property that was never intended to be profit making has lost economic viability: If the building is no longer suitable for the owner's purposes and the owner cannot house its programs in the building, hardship relief is available (A-4). This standard ensures that the owner will always be able to use its property; the owner will not have to find a replacement building just because its building has been



designated as a landmark.

Because this standard looks to the specific owner's use of the property to measure economic viability, it is easier for the owner of a tax exempt property to obtain hardship relief than it is for owners who are not eligible for relief under this standard. All the tax exempt owner need show is that it cannot house its activities in the landmark structure and the structure cannot reasonably be adapted for the owner's charitable purposes. In the case at bar the District Court found as fact and the Court of Appeals affirmed that petitioner "failed to prove that it is incapable of carrying out its charitable purpose within those facilities" and, therefore, there had been no taking of petitioner's property (A-18, 56).

Finally, there is no merit to petitioner's assertion that the decision below conflicted with the decision of the New York State Court of Appeals in Seawall Associates v.



City of New York, 74 N.Y.2d 92, 542 N.E.2d 1059, cert. denied sub nom. Wilkerson v. Seawall Associates, _ U.S. _, 110 S.Ct. 500 (1989). In its opinion in Seawall the Court of Appeals cited Penn Central with approval and discussed at length the reasons why the law at issue was "unlike that of the Landmarks Law in Penn Central." 74 N.Y.2d at 108-09, 542 N.E.2d at 1066. Moreover, the New York Court of Appeals has rejected a similar challenge to the Landmarks Law, also brought by a religious property owners. Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 415 N.E.2d 922 (1980). Thus the purported conflict is non-existent in the eyes of the New York Court.

CONCLUSION

**THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE DENIED.**

February 1, 1991

Respectfully submitted,

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***Counsel of Record**

Supreme Court, U.S.

FILED

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No. 90-900

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE
VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

—against—

THE CITY OF NEW YORK AND
THE LANDMARKS PRESERVATION COMMISSION OF
THE CITY OF NEW YORK,

Respondents.

REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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February 8, 1991

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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1990

No. 90-900

**THE RECTOR, WARDENS AND MEMBERS OF THE
VESTRY OF ST. BARTHOLOMEW'S CHURCH,**

Petitioner,

v.

**THE CITY OF NEW YORK AND
THE LANDMARKS PRESERVATION COMMISSION OF
THE CITY OF NEW YORK,**

Respondents.

**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PRELIMINARY STATEMENT

Our petition pointed out that the instant case involves issues of national significance that are the subject of conflicting decisions in the lower courts. That fact — largely ignored by respondents — has been dramatically underscored by the concurrent filing of a petition for a writ of certiorari in *First*

Covenant Church of Seattle v. City of Seattle, 114 Wash.2d 392, 787 P.2d 1352 (1990), *petition for certiorari filed*, December 6, 1990, No. 90-892.

As indicated by the petition in *First Covenant*, the decision of the Supreme Court of Washington in that case is in direct conflict with the decision of the Second Circuit herein. The *First Covenant* petition also provides a further showing of the importance of the issues at stake in both cases. In this case we have emphasized the concerns of the religious community with the impact of landmark and historic preservation laws — an emphasis reinforced by the filing of *amicus curiae* briefs from a broad spectrum of religious organizations. At the same time, the petitioner in *First Covenant*, a municipality, has pointed out the interests of the many state and local governments across the country that have enacted historic preservation laws. Taken together, there can be little doubt that the “inconsistency and confusion over the constitutionality of applying [preservation] legislation to the large number of historical religious structures,” *id.*, is a matter of serious national concern. The contemporaneous filing of petitions for certiorari in this case and in *First Covenant* provides this Court with a particularly fitting occasion to dispel the inconsistency and confusion.

ARGUMENT

Respondents’ brief in opposition initially seeks — as it must — to defend the constitutional standard applied by the courts below: that no claim is stated under the First or Fifth Amendment absent a showing that petitioner “can no longer use [its] property.” (Resp. Br. p. 14). Contrary to respondents’ claim, however, no support for such a standard can be found in “this Court’s settled First and Fifth Amendment jurisprudence.”

The obvious defect in a standard of “continued use” is that it looks *solely* at what the church is left with and ignores what has been taken away from the church and what the church has been prevented from doing. Thus, it fails to measure either

the burdens that have been placed on the free exercise of religion or the value of the property that has been appropriated for governmental purposes. Recognizing the patent unfairness of such a standard, respondents also pursue an alternative course, *i.e.*, attempting to denigrate the magnitude of the burdens imposed and the value of the property taken. As shown below, however, that approach is equally unavailing.

I. THE LANDMARKS LAW IMPOSES SUBSTANTIAL BURDENS ON THE FREE EXERCISE OF RELIGION

A. The Burden Of The Landmarks Law On Religious Organizations Generally

In our petition, we showed in some detail how the vagueness of the criteria provided by the Landmarks Law, coupled with an almost total absence of due process in the procedures of the Landmarks Commission, together create a chilling effect on the free exercise of religion that is palpable and severe. (Pet. pp. 14-18).¹ In response, respondents are content to note in passing that the criteria under the law withstood a challenge in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Thus, respondents persist in the tactic, surprisingly successful in the courts below, of refusing to notice that *Penn Central* was not a First Amendment case. That tactic, however, should not be permitted to succeed in this Court. The availability of judicial review may have been, as respondents argue, some comfort in *Penn Central*, but it is no answer where the prior

1. The inherent unfairness of the procedures of the Commission is further documented in the *amicus curiae* submission of the Church of St. Paul and St. Andrew. We respectfully urge the Court to consider whether any church or other religious organization, informed by the experiences of the Church of St. Paul and St. Andrew and of the petitioner herein, would even attempt to gain relief under the law against the opposition of the Landmarks Commission and the various preservationist groups with which the Commission enjoys a symbiotic relationship. (See *id.* at pp. 3, 15).

restraint of a First Amendment freedom is involved. *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).

B. The Burdens Of The Landmarks Law On St. Bartholomew's

1. The Burden On Religious Belief

Respondents quote approvingly an observation of the court of appeals that "no one seriously contends that the Landmarks Law interferes with substantive religious views." (Resp. Br. p. 9). On the contrary, however, we contend precisely that. It is the belief of the Rector, Wardens and Vestry of St. Bartholomew's that the dictates of their faith *require* the use of the Church's resources to support the religious mission of the Church. This theological imperative is set forth explicitly in the statement of Bishop Moore quoted in our petition. (Pet. pp. 19-20). The record contains similar testimony by the Rector, the Senior Warden and members of the parish. (A. 325-33, 355-63, 405). If still further theological support is required, it is readily available in the amicus curiae submissions filed in support of the petition.²

2. The Financial Burden

Our petition showed that the effect of the Landmarks Law was to destroy more than eighty percent of the value of the Church's principal asset. The Church has thereby been prevented from deploying that value, or any portion of it, in support of its mission. (Pet. p. 5). In response, it is argued here, as it was below, that free exercise rights are not impaired by the imposition of a financial burden under a "generally applicable" law, citing *Jimmy Swaggart Ministries & Board of Equalization*, ___ U.S. ___, 110 S.Ct. 688 (1990); *Hernandez v. Commissioner*, ___ U.S. ___, 109 S.Ct. 2136 (1989); and

2. See particularly the scriptural exegesis set forth in the submission of the Roman Catholic Archdiocese of New York *et al.* at pp. 5-9.

Employment Division v. Smith, ___ U.S. ___, 110 S.Ct. 1595 (1990).³ That argument, however, cannot withstand analysis.

To begin with, even respondents recognize a limit to their argument in the cautionary language of *Swaggart* with respect to a financial burden that would "choke off" religious practices. Accordingly, respondents contend that protection against such an impact is found in the *Ethical Culture* test that purports to provide relief where the Landmarks Law "prevents or seriously interferes with carrying out the charitable purpose." *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 455, 415 N.E.2d 922, 925 (1980). (Resp. Br. pp. 19-20). That test, however, is fundamentally inadequate. As articulated by the New York Court of Appeals and applied by the Landmarks Commission, the test refers *only* to the condition of the landmarked building — and the need of a church to use a landmarked building to generate income for the support of its religious mission is considered to be wholly irrelevant. (See Pet. p. 20). As a result, the *Ethical Culture* test permits the Landmarks Law to impose financial burdens far beyond the modest tax consequences at issue in *Swaggart* and *Hernandez*. Indeed, it permits an impact on religious mission, *i.e.*, the choking off of religious practices, that is inescapable and severe.⁴

3. Respondents also attempt to dispute the fact that eighty percent of the value has been destroyed. (Resp. Br. p. 13 n. 2). As shown below, the attempt amounts to little more than a quibble. (See *infra* p. 8).

4. Moreover, the basic inadequacy of the *Ethical Culture* test was seriously compounded by the courts below. By requiring petitioner to prove that it "can no longer carry out its charitable purposes," the courts below removed from the *Ethical Culture* test the concept of "serious interference." In this case, even if one were to conclude, as the court of appeals did, that the Church could somehow bear \$4.5 million of repair and rehabilitation costs, it would have been difficult to believe that the diversion of such an amount from support of the Church's mission was not a "serious interference" with its charitable purpose. In the eyes of the courts below, however, such interference was immaterial.

Furthermore, as set forth in our petition, there is no principled basis on which the Landmarks Law can be considered "generally applicable" within the meaning of *Smith* or any prior case law. The singling out of individual buildings as landmarks is, for example, altogether unlike the effect of zoning or historic district laws that *are* generally applicable to buildings within a specified area. Nevertheless, in a curious *non sequitur*, respondents argue that:

Petitioner's failure to challenge the designation in the many years since 1967 is telling evidence that the Landmarks Law is a neutral law of general applicability that may be validly applied to properties owned by religious organizations. (Resp. Br. p. 23).

In fact, the Church did not seek judicial review of the initial designation because it relied on assurances by the Commission that it would be prepared to accommodate the future needs of the Church.⁵ Ultimately, of course, such assurances proved to be quite illusory.

5. The initial designation contained the following language:

By this designation of the Landmark and Landmark Site, it is not intended to freeze the structures in their present state or to prevent the alteration or expansion of existing structures or the erection of other structures to meet the Church's requirements in the future. The Commission believes it has the obligation and it has the desire to cooperate with the owners of Landmarks in such situations and looks forward to working with representatives of St. Bartholomew's Church should such contingencies occur. (A. 597).

The inclusion of such language resulted from negotiations following an objection to the designation by the Church in a letter dated April 26, 1966. The first application of the Church for a Certificate of Appropriateness relied explicitly upon the assurances in the designation. (A. 193-97).

C. The Burden Of Entanglement

It is clear that the Landmarks Law gives rise to an unprecedented degree of entanglement between church and state. The problems of entanglement have traditionally been analyzed in the context of the establishment clause, e.g. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In addition, we suggest that entanglement may also be considered as a discrete form of burden under the free exercise clause. Viewed in either context, however, the entanglement between the Landmarks Commission and owners of landmarked buildings is truly extraordinary.

Respondents attempt to conceal that fact by glibly characterizing the proceedings before the Commission as an inquiry into "objective architectural concerns" and "objective financial data." (Resp. Br. pp. 21-22). As shown in our petition, the inquiries of the Commission are in fact far broader and far more intrusive. (Pet. p. 21, n. 12).⁶ Moreover, respondents ignore the fact that the judgments ultimately applied by the Commission are unmistakably subjective, e.g., that it is acceptable for the Church to be forced to operate its breakfast feeding program from the Mortuary Chapel and to operate its pre-school from a fifth floor served by an unenclosed fire escape (A. 569-71; 450); that repairs to the Church's building should be done piece-meal, over several years, to avoid the need to comply with the current building code (A. 849-50); and that the Church's fund raising efforts should be concentrated on building repair and preservation. (A. 864-65). In short, the Commission's judgment, as applied to a variety of activities, was that, whenever and wherever necessary, support of the Church's religious mission must yield to support of the Church's landmarked building. That judgment, we submit, offends both the

6. The nature of the inquiries made, and judgments applied, by the Commission are also illustrated in the *amicus curiae* submission of the Church of St. Paul and St. Andrew. The *amicus curiae* submission of the Council on Religious Freedom, at pp. 5-14, provides a cogent analysis of relevant case law under the establishment clause.

free exercise and the establishment clauses of the First Amendment.

II. THE VALUE OF THE PROPERTY APPROPRIATED

In addressing petitioner's claim under the taking clause, respondents attempt to cram the facts of this case into the mold of *Penn Central*. Unfortunately, they simply do not fit.

Thus, respondents attempt to argue that, as in *Penn Central*, petitioner's development rights have not been lost because here (a) the Commission might permit petitioner to build *something* above its Community House; and (b) the air rights above the Community House might *someday* be transferred elsewhere. (Resp. Br. pp. 26-27). Both prongs of respondents' argument are devoid of substance.

As pointed out in our petition, the only expansion the Commission has indicated it might approve is a two-story addition — an expansion that would alleviate *some* of the Church's space problems but would generate no revenue to repay the cost of its construction, much less provide support for the Church's mission.⁷ Moreover, even if constructed, such an

7. The court of appeals saw a two story addition as a partial solution to the inadequacy of the Church's existing space. Respondents misstate the record in asserting that

The Courts below determined that petitioner could house all its desired activities in the Community House and, therefore, did not need to demolish the landmark structure. (Resp. Br. p. i).

On the contrary the court of appeals explicitly found that "the Community House currently is too small." (19a). This led the court, like the Landmarks Commission, to propose a two story addition, but neither the court nor the Landmarks Commission made *any* allowance for the cost of *any* expansion. The court also conceded that such an expansion "may not provide ideal facilities" and noted specific space needs that would not be met by the proposed addition. (*Id.*).

expansion would reflect a use of the Church's development rights that is essentially *de minimis*.

Similarly fanciful is the suggestion that any substantial value should be attributed to the Church's theoretical ability to transfer the air rights over the Community House. As pointed out in the petition, the Church — unlike *Penn Central* — owns no other properties to which such air rights could be transferred and has no prospects for such a transfer. (Pet. pp. 24–25). Speculation as to the possibility of some future value provides no basis whatever to conclude that the impact of the Landmarks Law has been significantly mitigated.

Respondents also argue that the legal standard adopted by the New York court provides adequate relief from the burdens of the Landmarks Laws. (Resp. Br. pp. 27–28). As we have shown, however, the *Ethical Culture* test focuses solely on the suitability of the landmarked building for existing uses and ignores the owner's right to develop its property. In that crucial respect, the *Ethical Culture* test is in conflict not only with *Penn Central* but with the more recent decision of the New York Court of Appeals in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, *cert. den. sub nom., Wilkerson v. Seawall Associates*, ___ U.S. ___, 110 S. Ct. 500 (1989).⁸ Moreover, as we have shown, even the narrow scope of relief provided by the *Ethical Culture* test was further limited by the courts below. (See *supra* p. 5, n. 4).

In sum, it is abundantly clear that the instant case is very different from *Penn Central* in virtually every respect. Indeed,

8. Respondents attempt to distinguish *Seawall* by means of a subtle misquotation: "In its opinion in *Seawall* the court of appeals cited *Penn Central* with approval and discussed at length the reasons why the law at issue was 'unlike that of the Landmarks Law in *Penn Central*.'" (Resp. Br. p. 29). In fact, however, the court in *Seawall* stated that *the effect of the law at issue therein was unlike that of the Landmarks Law in Penn Central*. So here, the effect of the Landmarks Law is quite unlike that in *Penn Central* — for the very reasons noted by the court in *Seawall*. See *id.*, 74 N.Y.2d at 108 n. 8, 542 N.E.2d 1066 n. 8.

the expansion of *Penn Central* by the courts below to deny relief under the facts of this case necessarily rejected fundamental values that had been recognized in *Penn Central* and reaffirmed in the subsequent decisions of this Court.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Dated: February 8, 1991

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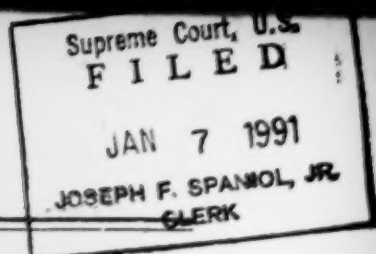
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(2)
No. 90-900



IN THE
Supreme Court of the United States

October Term, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE
VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

against

THE CITY OF NEW YORK and THE LANDMARKS
PRESERVATION COMMISSION OF THE CITY OF NEW
YORK,

Respondents.

Brief of the Committee to Oppose the Sale of St. Bartholomew's Church Inc., J. Sinclair Armstrong, Robert E. Morris, Jr., Doris Capp Stass, George H. Weiler, III, Madeleine Calder, Beatrice Lotz, Bromwell Ault, Jr., Neal Goldman and Charlotte Pierce Armstrong, as *Amici Curiae* in Support of Respondents

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— *Artemisia* —

No. 90-900

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE
VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

-against-

THE CITY OF NEW YORK AND
THE LANDMARKS PRESERVATION COMMISSION OF
THE CITY OF NEW YORK,

Respondents.

THE INTEREST OF THE
AMICI CURIAE

This brief amici curiae is submitted in opposition to the petition for a writ of certiorari filed by the petitioner church ("the Church") and in support of respondents the City of New York and the Landmarks Preservation Commission ("the

Commission").^{1/}

The individual amici curiae herein are long-standing members of the Church and a not-for-profit corporation which they helped form in 1980 to oppose the Church's plans to destroy its landmarked property and to construct, in a joint venture with a developer, a commercial high-rise office tower on its site. (The amici curiae will hereafter be collectively referred to as "the Committee")

The amici curiae fully participated in the proceedings in the District Court, in the Court of Appeals, as well as in the administrative proceedings before the Commission, upon whose record this case was tried.

To assure a full record in the District Court, the Committee was permitted, at the outset of the action, to participate as

^{1/}Petitioner and respondents have consented, by stipulation filed herewith, to the filing of this brief.

amici curiae in the proceedings. (A-187)^{2/} As the District Court stated, the Committee was "allowed . . . to intervene as amicus curiae" because of its "interest in seeing to it that I get a full record". (District Court Transcript of November 20, 1987, page 131). The District Court added (Id. at pages 27-28):

I had a feeling that I would not get all the facts I needed to resolve this issue intelligently from the parties. That being the case, I ought to let someone else give them to me, either as amicus curiae or as intervenors.

The trial was conducted, over the Committee's objections, on the Commission's non-judicial administrative record.^{3/} The

^{2/} References to "(A. ____)" are to the appendix in the Court of Appeals. The appendix in the District Court is cited by volume and page (e.g. 10/3271 is volume 10 page 3271).

^{3/}The Committee urged that a trial de novo was required to resolve the constitutional issues raised by the Church. The rejection of the Committee's motion to intervene on the

Committee had participated in the Commission proceedings, to the limited extent permitted, and presented evidence to rebut the Church's extensive misrepresentations of fact. With the intimate knowledge of the affairs of the Church possessed by its members who were long-time parishioners, the Committee contested the credibility of the Church's case. As one reporter wrote:

But the most serious damage [to the hardship application] was inflicted by Armstrong's Committee to Oppose the Sale of St. Bartholomew's Church. The members of the Committee knew the Church inside and out. They knew where the weak points in the Church's arguments were. Over several months, the relationship of the Committee to

(Footnote continued from previous page)

side of defendants to force a trial de novo was appealed to and affirmed by the Court of Appeals for the Second Circuit. The Committee has now filed a separate petition for certiorari. That petition urges that if the Church's petition is granted, the Committee's petition should also be granted so that the Court may, in the event of a reversal, remand the case for a trial de novo.

the hardship application was that of a German Shepard to a stray sock. When the hearing process was over, there was hardly a thread of the application that was still intact.

(Manhattan Inc., July 1986 Issue, page 24.)

The Committee now submits this amicus brief in opposition to the Church's petition for certiorari (a) in order to call to the attention of the Court the misstatements of fact set forth by the Church and (b) to respond to the Church's attempt, under the guise of the Free Exercise clause, to have this Court consider exemption of religious organizations from landmark regulations so that such organizations may pursue commercial land development under different rules than apply to others.

SUMMARY OF ARGUMENT

Petitioner Misstates The Facts

This case is not about religion. It is about a church's efforts, in partnership

with a commercial real estate developer, to destroy its landmark property and to develop its site to its highest commercial value. Under the guise of religious freedom, the Church seeks special treatment so that it and its developer may be relieved of a land-use regulation which applies to all.

To accomplish its goals, the Church attempted, but failed, to prove that maintenance of the landmark was a hardship and that the refusal of the Commission to remove the burden of the landmark designation interfered with its freedom of religion and constituted a taking of its property. The District Court carefully analyzed the record and concluded that the Church "failed to prove that its community house was inadequate for the purposes to which it is devoted"; and that it was unable to pay for necessary repairs and rehabilitation. (A. 1159) The Court of Appeals affirmed those factual conclusions as not

clearly erroneous.

Having failed in its proof below, the Church now misrepresents the record in an attempt to frame legal issues which will convince this Court to grant its petition for certiorari. It makes alleged factual statements which have no basis in the record as well as others which were never proven to the satisfaction of the District Court.

The Church now falsely presents itself as an embattled church, gravely burdened by a landmark designation which has been thrust upon it and which threatens its very survival. It omits to tell this Court that it voiced no objection to the designation of its property as a landmark in 1967; that for 16 years thereafter it made no objection to the designation; and that it first protested its landmark designation after it signed a contract with a real estate developer in 1983. In that contract, the developer agreed

to construct a commercial high-rise office tower on the site in exchange for a long-term lease. The Church contractually agreed, for their mutual benefit, to seek removal of its landmark designation and to litigate the issue, if necessary, up to this Court.

Contrary to the findings of fact made against it in the trial court and without basis in the record, the Church boldly states (a) that its "once-thriving" congregation is "now diminished", resulting in a "concomitant weakening of its financial viability" (the Church's petition, p. 22); (b) that as a result, it is "left with buildings that are ill-suited to their needs and costly to maintain and repair" Id. at p. 7); and (c) that it should be permitted to demolish its landmarked property and construct an office tower in its place because only such commercial development "would generate income" which is "essential to assure its

survival", as well as "to repair and rehabilitate the Church building" and "to support its mission". (Id. at p. 3)

The record does not support the Church's present picture of itself as a "once-thriving" "now-diminished" congregation, struggling to survive. Indeed, it argued the contrary in the District Court where it contended that because of its expanding activities and programs, it required more space than its present buildings provide. The District Court disagreed. Having failed with that approach, it should not now be permitted to reconstruct the facts to enhance its petition for certiorari.

The overwhelming weight of the record facts as found by the trial court demonstrates that the Church's landmark designation creates no undue burden upon it. The Church's claims of hardship below and on this petition are nothing more than a pretext to permit it and

its real estate developer to commercially develop its property to its highest value. The record facts show that the Church is a prosperous one, with an enviable endowment of some \$14 million, annual revenues of over \$3 million, full-well able to maintain its landmark structures which are more than adequate to house its needs and uses. Its unfounded claims of hardship and of infringement of its religious freedom are nothing more than a pretext designed to advance its joint venture to commercially develop its property.

Petitioner's Extreme View of the Law

The Church seeks to advance its commercial goals under an extreme view of the Free Exercise Clause - that religious organizations should be singled out for special treatment under the Landmarks Law. The across-the-board, automatic exemption which the Church seeks from the facially neutral

landmark statute would be an unconstitutional establishment of religion. The Church would have this Court consider placing religious entities in a position of advantage vis-a-vis non-religious owners of landmarked property by exempting them (the religious owners) from the strictures of the Landmarks Law. This is forbidden by the Establishment Clause. This Court should not grant certiorari to consider the Church's extreme position.

The Free Exercise Clause was designed to protect against direct burdens on religious practice, not the kind of remote and indirect burden the Church claims exists here. The Free Exercise Clause was not designed to proscribe neutral regulation of secular activity like the Landmarks Law.

The Landmarks Law does not burden any aspect of the Church's activity in a constitutionally recognizable way. Furthermore, to the extent that there are individual cases of

genuine hardship constituting a justifiable claim for relief, the hardship provisions of the Landmarks Law are available.

Additionally, the Landmarks Law does not impermissibly entangle the Commission and religious entities. The Commission does not in any way involve itself in interpreting a religious group's theology, defining its mission, or establishing its priorities. The Commission makes purely secular judgments that are well within its competence. This Court has long upheld agency practices of the sort involved here against entanglement challenges.

Lastly, the District Court found that there was no unconstitutional taking of the Church's property, ruling that the Church had failed to establish that denial of permission to destroy its landmark and to construct a 47-story commercial office tower interfered in any manner with the primary use of the pro-

perty over the past 60 years as a place of worship and as a center for its related activities.

In sum, certiorari should not be granted to consider the extreme interpretation of the Free Exercise Clause and the taking Clause which the Church expounds.

POINT I

IN AN ATTEMPT TO FRAME CONSTITUTIONAL ISSUES FOR REVIEW, THE CHURCH MISSTATES THE FACTS AND MAKES A FACTUAL PRESENTATION WHICH IS UNSUPPORTED BY THE RECORD AND CONTRARY TO THE FACTUAL CONCLUSIONS REACHED BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS

- A. The Church Did Not Object to The Landmark Designation In 1967 of Its Two Buildings and Site And Raised No Objections Until 1983 When It Signed A Contract with a Developer Conditioned Upon Removal of The Landmark Designation

In 1966, the Commission proposed the designation as a landmark "of St. Bartholomew's Church and Community House and the Proposed Designation of the related landmark

Site." The Church did not oppose the landmark designation. As a result, in 1967, the Commission designated both buildings as landmarks and the entire property as their landmark site.

In its petition the Church ignores the fact that it did not oppose the 1967 landmark designation and, until 1983, accepted the responsibilities of a landmark owner. Its position changed in 1983 when the real estate developer with whom it had contracted required it to obtain permission from the Commission to demolish its landmark and to construct an office tower in its place. Only then did it claim that the maintenance of the landmark constituted a hardship.

B. The Architectural and Aesthetic
Significance of the Community House

The Church attempts to minimize the significance of the Community House by incor-

rectly stating that when the property was landmarked, the Commission "did not ascribe any distinctive architectural features to the community house." (Petition, page 4) To the contrary, the Commission's designation report found (A 596, emphasis added):

St. Bartholomew's Church and Community House are handsome modern versions of Romanesque and Byzantine architecture, that the unusual use of polychrome in their building materials makes them outstanding in New York, that their decorations include significant works of art and that the Church and the Community House are outstanding examples of this style of architecture in the United States.

[The Community House] harmonizes with the Church through the use of the same warm-colored building materials, the continuation of the limestone band courses from the Church and chapel, and the interspersing of decorative details similar in character and scale to those used in construction of the main house of worship.

Noted architectural authority Ada Louise Huxtable commenting upon the landmark stated (New York Times, October 19, 1980):

The architecture of St. Bartholomew's consists of a church building and a community house that form an integrated L-shaped whole. Functionally, the structures are separate, but, visually, all the parts are unified.

That the beauty of St. Bartholomew's block contributes to the spiritual welfare of the city and all of its people is not part of the reckoning . . . Only in a culture when commercial values have vanquished spiritual values would such a church and its setting not be considered a legacy beyond price from the past to the present.

In sum, the Church ignores the record facts when it argues that the Church Building is the only significant architectural feature of the landmark property.

- C. As Required By Its Contract With Its Developer The Church (i) Sought Permission To Demolish Its Landmark Community House, Destroy the Landmark Site and Construct A Commercial High Rise Office Tower and (ii) Has Prosecuted Its Claims to The Supreme Court

In December 1983 the Church contracted to enter into a lease with a commercial developer to build a 59 story office tower.

The contract required the Church to obtain permission from the Commission to demolish the Community House. Failing that, the Church was required to institute "Court actions and appeals, to the extent permitted, up to and including the United States Supreme Court."
(11/3782-83)4/

In December 1983, in accordance with its contractual obligations to its developer, the Church dutifully applied to the Commission for a Certificate of Appropriateness to re-

4/Two years earlier, in 1981 the same developer had agreed to immediately sign a lease with the Church and to pay \$1,000,000 upon signing, with the funds to be used by the Church for the landmark fight. The Church thereafter reneged and refused to sign the lease. Instead, this allegedly hard-up Church, renegotiated the deal, signed a Contract to Lease in 1983, gave up the right to receive \$1,000,000 up front from the developer and agreed to pay substantially all of the landmark expenses beyond some \$500,000 to be advanced by the developer. (13/4786) No hardship prevented the Church from delaying its deal for two years to renegotiate and from giving up the right to obtain \$1,000,000 from the developer.

place the Community House with a 59 story office tower.

D. The False Claims Of Financial Distress

In its petition the Church tells this Court that income to be generated from its real estate is "essential" "to assure its survival." (Petition, p. 3)

This same alarm has been sounded since the early 1980's when the Church first began falsely predicting "insolvency" as a ploy to justify destruction of its landmark.

Although totally inappropriate in an application for a certificate of appropriateness seeking permission to alter the landmark, the Church, of its own accord, interjected its finances into its first two applications before the Commission. It falsely claimed in 1983 that if it were not permitted to destroy its landmark "the Church will become insolvent and forced for lack of finances to close its

doors and discontinue its operations in the near future. This is an imminent possibility". "Without major additional financial resources the Church will face insolvency within the next several years." (Memorandum of December 15, 1983 in Support of the Application of the Church for Certificate of Appropriateness, pages 7, 28.)^{5/}

To buttress its "dooms day" scenario, the Church presented false projections, projecting cumulative deficits of \$14,980,000 by 1990 and \$19,174,000 by 1991^{6/} (Id at 28-29)

^{5/}By stipulation of the parties, all materials relating to the Church's first application for a certificate of appropriateness are included in the trial record but were not included in the Appendix submitted to the Court. A complete list of the materials relating to the first application is set forth at the end of the Table of Contents bound into the first volume of the Appendix.

^{6/}These outrageous projections were later abandoned when the Church filed its third application (i.e. its hardship application)

It falsely claimed that all but \$500,000 of its \$14 million endowment was unrestricted, when in fact at least \$6,400,000 was unrestricted. (12/4228, 4233-4234); that due to lack of finances it was compelled to close the sanctuary six days a week in order to save \$45,000 per year; and that it could not pay its 1984 share of its diocesan assessment of \$142,000. (12/4286- 4287, 4297)

When the Church's 1984 financials were ultimately filed by it in connection with its hardship application, they reflected annual revenues of \$3,825,805 (10/3713) and marketable securities of \$12,560,099 (16/5487). It was thus patently clear that the Church could well afford the \$45,000 required to keep its house of worship open seven days a week, if it wished to do so, and that its closing was part of its efforts to

"feign" a financial hardship.^{7/} The 1984 financial statements also revealed that, contrary to its statements, the Church had in fact paid its 1984 diocesan assessment of \$139,476. (10/3725)

That the Church was prepared to say and do whatever was necessary to achieve its goals and to accommodate its joint venture with its developer is obvious. Even on this petition, and notwithstanding the record facts to the contrary, the Church continues to argue that the income from commercial development of its property is "essential . . . to assure its survival." (Church's petition, p.3)

^{7/}The Church's December 31, 1984 financial statements show \$2,733,244 support and revenue plus \$1,092,561 of contributions, bequests, investment income and gains on investment transactions. (10/3713) Out of these revenues of \$3,825,805, the Church incredibly argued that although it was able to find \$232,019 in 1984 to spend on "Development expenses", it could not find the \$45,000 needed to keep its house of worship open during the week. (10/3713)

The District Court noted the size of the substantial endowment with which the Church is blessed, its substantial annual income and the fact that it has operated, over a 10 year period, at a virtual break-even level (even while spending \$1.6 million on so-called "development expenses"). (A 1154-57) The trial court found that the Church's very substantial worldly assets are ample to pay for the normal maintenance and repair required of its buildings. Surely, there can be no question on the basis of this record of the Church's "survival".

E. The Church Failed To Prove That Its Community House Was Inadequate For The Purposes To Which It Was Devoted, And That It Could Not Afford The Required Repairs

The factual picture which the Church paints in its petition - of a "once-thriving" and "now diminished" congregation burdened with "ill-suited" buildings, which it cannot

afford to maintain - is contrary to the position which it espoused below. At the trial level it did not contend that its activities and use of its buildings were in any way "diminished" by a declining congregation. To the contrary, it contended that the Community House which it has used for some 60 years was inadequate to accommodate the variety of ever-expanding and bustling activities that compete for the space. As the District Court summarized (A 1141):

Plaintiff contends that the evidence shows that: the usable space available in the community house is insufficient to accommodate the variety of activities that compete for the space; that it wishes to expand its existing programs but cannot do so given those space constraints; that it is forced to conduct activities in spaces that are inappropriate for those activities; and that renovation of the interior of the community house is impractical and not feasible."

The District Court rejected the Church's contentions (A 1159):

"[T]he Court finds, as a matter of fact, that the Church has failed to prove that its community house is inadequate for the purposes to which it is devoted, that the Church has failed to prove that it is incapable of carrying out its charitable purpose within those facilities, and that although those facilities do require some repair and rehabilitation, the Church has failed to show that it cannot afford to pay for those necessary repairs and rehabilitation."

The Court of Appeals affirmed and held that it was not clearly erroneous for the District Court to conclude "that the Church failed to prove its Community House was fundamentally unsuitable for its current use and that the cost of repair and rehabilitation is beyond the financial means of the Church."

On this petition, the Church should not be permitted to deviate from, and should be bound by, the factual findings against it.

POINT II

CERTIORARI SHOULD NOT BE GRANTED TO
CONSIDER AN EXEMPTION FROM THE LANDMARKS
LAW FOR ALL RELIGIOUS ORGANIZATIONS
WHICH EXEMPTION WOULD VIOLATE THE
ESTABLISHMENT CLAUSE

The Church advances the extreme proposition that the First Amendment requires exemption of all religious organizations from the Landmarks Law - that the First Amendment requires the City to permit religious entities to seize the profits of what would be, for other property owners, illegal real estate development ventures. Such aggressive assistance to religious institutions is flatly forbidden by the Establishment Clause.

The Landmarks Law is a facially neutral statute. Wisconsin v. Yoder, 406 U.S. 205 (1972), noted "the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." Id. at 220-21.

Government may not go out of its way

to assist religion. It may accommodate religion only to restore it to a position of parity with their secular counterparts. It may not place them in a position of advantage.^{8/}

Governmental action may not advance religion. Lemon v. Kurtzman, 403 U.S. 602 (1971) or have the effect of "endorsing" religion. See County of Allegheny v. ACLU, 109 S. Ct. 3086, 3100 (1989). An exemption of all properties owned by religious organizations from the Landmarks Law could not withstand this test. Petitioner would accord religious organizations an unfair competitive advantage over secular property owners in New

^{8/} As Justice Stevens has said, the Free Exercise Clause is "a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect." United States v. Lee, 455 U.S. 252 n.3 (1982) (Stevens, J., concurring in the judgment). See also Sherbert v. Verner, 374 U.S. 398, 410 (1963).

York's real estate market, which would have the effect of advancing religion.

The Church is not arguing that it is too small to accommodate all those who desire to worship there, or that all the space in the proposed sky-scraper to be constructed on the site of the Community House is needed to house the homeless or in some other way directly serve the charitable and religious purposes of the Church. Rather, the argument is that the Church must be allowed to build this commercial office tower - so that the income to be generated from the project may inure to the benefit of the Church. Freedom of religion is implicated only, if at all, in the sense that the profits generated by the commercial venture might be used to finance activities, some of which arguably could be connected to the Church's teachings on charity.

As Judge J. Skelly Wright put it in rejecting, as violative of the Establishment

Clause, a religious institution's claim that it was exempt from FCC regulation:

[S]ponsorship is what this exemption accomplishes. It is a sure formula for concentrating and vastly extending the worldly influences of those religious sects having the wealth and inclination to buy up pieces of the secular economy.

King's Garden, Inc. v. Federal Communications Commission, 498 F.2d 51 (D.C. Cir. 1974). He concluded that "creating this gross distinction between the rules facing religious and non-religious entrepreneurs" would be "on collision course with the Establishment Clause." Id. ^{9/} To exempt religious entities (or this religious entity's real estate

^{9/}See also United States v. Lee, 455 U.S. 252, 261 (1982):

When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

venture) from the Landmarks Law would "except" religious institutions in general (and this church in particular) "from a general obligation of citizenship" and would thereby violate the Establishment Clause. Wisconsin v. Yoder, 406 U.S. at 220-21.

The Church argues for a narrow exemption available only to religious organizations (and not to not-for-profit corporations in general). The express purpose of the exemption is to remove restraints on development of landmark properties owned or leased by religious organizations so that they might maximize the profits they generate from their property.

The direct consequence of exempting property owned by religious institutions from landmark designation and the attendant limitations is improvement of the Church's financial status. Thus, the purpose and effect of the exemption are to convey an immediate,

direct benefit to churches that will facilitate the expansion of their religious activities in violation of the Establishment Clause.

POINT III

THE FREE EXERCISE CLAUSE
DOES NOT REQUIRE AN EXEMPTION
FROM THE LANDMARKS LAW FOR
RELIGIOUS ORGANIZATIONS AND
CERTIORARI SHOULD NOT BE
GRANTED TO CONSIDER THE ISSUE

A landmarking law that treats all property owners the same cannot be said to "prohibit" the free exercise of religion.

Church property, like most private property, is subject to a variety of regulations regarding its use and development. In Lemon v. Kurtzman, 403 U.S. 602 (1971), ("[f]ire inspections [and] building and zoning regulations," were listed as "examples of necessary and permissible contacts" between government and religion. Id at 614. See also

Tony & Susan Alamo Foundation v. Secretary of Labor, 105 S. Ct. 1953, 1963 (1985).

Free Exercise challenges to land-use regulations like the Landmarks Law often are assessed under the standard announced in Braunfeld v. Brown, 366 U.S. 599, 607 (1961):

[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goal, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

This test asks three questions. Is the preservation of landmarks a valid secular purpose? In Penn Central Transportation Co. v. New York City, 438 U.S. 104, 108-09, 134 (1978), this Court said it was. Is the burden (if any) placed on religious organizations indirect? This case is not one where action consistent with dictates of faith is criminalized, see Wisconsin v. Yoder, 406 U.S. 205

(1972) or otherwise penalized, see Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981). Though some of the Bishop's aspirations may be unsated, the City is not threatening the Church, or any of its members, with criminal sanction or denial of vital subsidies. Not even the Church is claiming that the Landmarks Law imposes a direct penalty on the Church as such. Can the state accomplish its purpose by means which do not impose the burden? Obviously not. The landmarks at issue can be saved only if they are not destroyed.

The application of the Braunfeld test, we submit, dooms the Church's claim.

In Tony & Susan Alamo Foundation v. Secretary of Labor, 105 S. Ct. 1953 (1985), this Court stated that "[i]t is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum,

inclusion in the program actually burdens the claimant's freedom to exercise religious rights." Id at 1963 (emphasis added). See also United States v. Lee, 455 U.S. 252, 256-57 (1982); Thomas v. Review Board, 450 U.S. 707, 717-18 (1981).

Of course, a true burden must be shown. See, e.g. Wisconsin v. Yoder, 406 U.S. 205, 218 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

The Landmarks Law does not burden the Church's religious activity. The Church exercises its religion, burdened only by the obligations that face every owner of a landmark. It is not compelled to act contrary to religious beliefs or to abandon any religious belief.

The Church is not theologically compelled to build a high-rise office tower. Construction of the office tower is not a religious act. The Church argues only that

the construction of the building will, hopefully, generate profits which the Church ostensibly will use to "support its mission."

The City has every right to control the secular commercial activity of a church. No Church has a constitutional right to a special competitive advantage over similarly situated non-religious commercial actors; no church has a constitutional right to maximum profits in commercial ventures; and no church should be permitted to invoke a religious freedom argument designed solely to advance a commercial joint venture. Stripped of its rhetoric, the Church's presentation does not reveal a burden on religious practice; it reveals that the Church is not making as much money as it would if it had an advantage no other landmark property owner has - the unbri-dled right to develop. Whatever burden it feels is not a burden for purposes of Free Exercise Clause analysis. Jimmy Swaggart

Ministries v. Board of Equalization, 110 S. Ct. 688, 690 (1990); Hernandez v. Commissioner, 109 S. Ct. 2136, 2149 (1989). As this Court said in United States v. Lee, 455 U.S. 252 (1982):

When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

Id at 261. See also Braunfeld v. Brown, 366 U.S. 599, 605 (1971).

The Landmarks Law provides relief for nonprofit landmark owners in those cases where landmark status truly frustrates the specific purposes for which the building is used. N.Y. City Admin. Code, chap. 8, Sec. 207-8.0(a) (2), recodified as N.Y. City Admin. Code, chap. 3, sec. 25-309(a) (2). The New York courts have fashioned a remedy to religious owners who, unlike petitioner, because of

genuine hardship, must alter or demolish their landmark. Under this judicially created test, whenever prohibiting a religious organization from altering or demolishing its structure would "prevent or seriously interfere with the carrying out of [its] charitable purpose," permission to alter or demolish must be granted. Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510, 522, 496 N.Y.S.2d 183, 191, 505 N.Y.S.2d 24, 32, cert. denied, 107 S. Ct. 574 (1986); Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 454-55, 415 N.E.2d 922, 925, 434 N.Y.S.2d 932, 935 (1980); Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974); The Commission has exempted those religious institutions who have made the required demonstration. See, e.g., 1025 Fifth Avenue v. Marymount School, 123 Misc. 2d 756, 475 N.Y.S.2d 182 (Sup. Ct. 1983).

In sum, and for the the above reasons, the Church's extreme Free Exercise claim does not warrant granting certiorari.

POINT IV

THE LANDMARKS LAW DOES NOT IMPERMISSIBLY ENTANGLE THE COMMISSION AND THE CHURCH

The Landmarks Law does not impinge upon the Church's constitutionally protected interest in managing its own affairs and in Church autonomy.

The Commission does not in any way involve itself in interpreting a Church's theology, defining its mission, or engaging in its day to day affairs. The Commission determines only whether the Church's present space is adequate for stated needs.

Here, the Church claimed that its community house had insufficient space to service the programs it feels bound to run and

claimed that a new building must be constructed to provide adequate space. The Commission evaluated whether the group's existing space is adequate for the denominated programs and whether the proposed space is better. Such a determination is well within the Commission's competence, and does not "entangle" the Commission in the religious affairs of the Church.

The Commission does not presume to tell The Church how it should manage its affairs. The Commission merely regulates a structure that happens to belong to a church and which also must comply with building regulations, fire codes, and zoning laws.

The Commission comes into contact with the Church at rare, clearly specified moments. The designation decision, for example, occurred once, in 1967. Once the decision has been made, no further contact between the agency and the church was necessary. The Church initiated further contact

with the Commission by requesting permission to destroy or alter the landmark. In connection therewith the Commission confined its inquiry to purely secular matters.

This Court has found no entanglement and sanctioned governmental regulation of the secular activities of religious entities, as well as the identification of activities as secular.' See, e.g. Tony & Susan Alamo Foundation v. Secretary of Labor, 105 S.Ct. 1953 (1985; Tilton v. Richardson, 403 U.S. 672, 679 (1971); Hunt v. McNair, 413 U.S. 734, 737 (1973); Wolman v. Walter, 433 U.S. 299, 240 (1977).

Far more intrusive regulation of religious entities than the Landmarks Law have been approved. See, e.g. Tony & Susan Alamo Foundation v. Secretary of Labor, 105 S. Ct. 1953 (1985) Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688, 697-99

(1990); Hernandez v. Commissioner, 109 S. Ct. 2136, 2147 (1989); Bowen v. Kendrick, 487 U.S. 589 (1988).

POINT V

THE LANDMARKS LAW DOES NOT EFFECT
AN UNCONSTITUTIONAL TAKING OF THE
CHURCH'S PROPERTY IN VIOLATION OF
THE FIFTH AMENDMENT AND CERTIORARI
SHOULD BE DENIED

A. The Landmarks Law On Its Face
Does Not Violate The Taking
Clause Of The Fifth Amendment

In light of this Court's decision in
Penn Central Transportation Co. v. City of New
York, 438 U.S. 104 (1978) petitioner cannot
seriously contend that the Landmarks Law, on
its face, violates the Fifth Amendment Taking
Clause.

B. The Landmarks Law As Applied to
St. Bartholomew's Does Not Violate
The Taking Clause of The Fifth Amendment

Penn Central set forth the standards
used in determining when a "taking" has occur-
red under the Landmarks Law. (438 U.S. at

124). The New York courts have applied those standards to the property of a religious organization and held that:

because charitable organizations are not created for financial return in the same sense as private businesses, for them the standard is refined to permit the landmark designation restriction only so long as it does not physically or financially prevent or seriously interfere with the carrying out of the charitable purpose."

Society for Ethical Culture v. Spatt, 51 N.Y.2d 449, 454-55, 434 N.Y.S.2d 932, 935 (1980) (emphasis added)

Applying the same standard enunciated in Penn Central and applied in Ethical Culture, the District Court held that petitioner had failed to establish a taking by failing to prove that the landmark designation interfered with the primary use of the property as a house of worship and as a base for its activities. The Court of Appeals affirmed on

the law and the facts.

The Church is not a commercial owner and its community house was not erected to provide income. The District Court and Court of Appeals properly applied the standard enunciated in Penn Central and held that since the use of its buildings for its present activities is viable, there was no taking.

The petitioner's contention that a "taking" has occurred because it has been "denied the ability to exploit a property interest [it] heretofore had believed was available for development is quite simply untenable." Penn Central, 438 U.S. at 130. The lost income from a commercial real estate venture seeking the highest and best use of its property does not constitute an unconstitutional taking.

CONCLUSION

For the reasons stated, it is respectfully requested that the petition for certiorari of the Church be denied.

Respectfully submitted,

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③
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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE
VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

vs.

THE CITY OF NEW YORK AND THE LANDMARKS
PRESERVATION COMMISSION OF
THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Questions Presented

- I. Did the Court of Appeals err in holding that the New York City Landmarks Law does not constitute a substantial interference with the ability of Petitioner and its congregants to freely exercise their religion?
- II. Did the Court of Appeals err in holding that the Landmarks Law was a law of "general applicability"?
- III. Did the Court of Appeals err in failing to hold that there was no compelling state need to interfere with the free exercise of religion?
- IV. Did the Court of Appeals err in denying petitioner's "Entanglement" and "Takings" claims?



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INTEREST OF THE AMICI CURIAE

The Archdiocese of New York and the Diocese of Brooklyn are the Roman Catholic Church entities serving New York City. Together they offer massive spiritual and human welfare service to all, without regard to creed, in a City of about 7,200,000, of whom about 2,750,000 are Catholics organized in about 435 parishes having over 1,260 buildings.

In addition, the Archdiocese of New York similarly serves seven Counties north of New York City having a population of about 1,770,000, including about 850,000 Catholics organized in 199 parishes having over 600 buildings.

The New York State Catholic Conference is the instrument through which the Archdiocese of New York and the seven Catholic Dioceses throughout the State speak with one voice in the field of public affairs. They similarly offer service to all residents of New York State including about 6,685,000 Catholics organized in over 1,900 parishes having about 5,700 buildings.

Your *amici* are vitally interested in this case because over 100 communities throughout New York State and many more throughout the nation have enacted historic preservation laws which, under the guise of landmarking, retroactively "spot-zone" religious land and buildings to exalt the cause of architectural aesthetics above the spiritual and human-service mission which these resources were given to serve and which is the heart-core of our religious practice.

There is no need for such a perverse value system. In our country, beginning in Florida and the Southwest in the 1500's, our religious communities have provided, without the need for landmark legislation, by far, the greatest number of distinctive, lowrise buildings which those interested in architectural aesthetics have freely enjoyed. This deep-rooted religious tradition, going back millenia, will continue, subject, of course, to objective zoning and safety laws immediately applicable to all similarly situated owners. Nonetheless, when religious needs so require, aesthetics must yield to higher values.

It is our faith belief that our nation will prosper because we use our resources to conquer injustice and spiritual and human

deprivation, not because we preserve distinctive buildings. We ask this Court to restore to us our religious resources so we can practice that faith.

I. The Writ Should Be Granted Because the Interrelated Constitutional Issues Were Disregarded by the Court of Appeals and Profoundly Affect All the Religious Communities of Our Nation and Those They Serve

Twelve years ago the Court stated that "over the past 50 years, all 50 states and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance". *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 107 (1978)¹ The number of such laws has, by now, greatly increased. This situation has created a particular trauma for religious communities.

As the largest provider of distinctive buildings over the centuries, the religious communities now find that, when their religious needs have changed, their distinctive properties are being fossilized through landmarking. In a rapidly-changing society, where the spiritual and human welfare mission of Roman Catholics as well as that of other religious bodies is likewise changing, their need to adapt their resources to these changes is paramount.

Words sound empty if not rooted in the cold hard facts of reality. We therefore present here a small nationwide sampling of instances which have come to our attention wherein landmarking has unjustly impeded the mission of Roman Catholic communities. The other faiths can tell similar stories.

In New York City the pastor of Old St. Patrick's Cathedral put thermal pane windows on his landmarked school building to replace decrepit, but non-original, wooden windows. The three senior staff persons of the Landmarks Commission personally browbeat the aged pastor with threats of daily criminal

¹ *Penn Central*, we submit, is not precedent in this case for the reasons set forth in St. Bartholomew's Petition herein and below at Point II. C.

finances and jail if he did not immediately remove the thermal windows and replace them with wooden windows in the presumed original style. When asked about the impact of this on the parish fuel and maintenance budgets and on the learning environment and health of 850 school children, they replied, "That's irrelevant". Tragically, that was a "legally" correct reply because, under the New York City "Landmarks Law",² people *are* irrelevant and the government thereby reverses basic Christian priorities by putting buildings before people and unjustly commandeers religiously dedicated property to enforce that perverted priority.

In Buffalo, New York, the parish population of St. Mary's Church had, for the most part, moved away. The church building was in great need of repairs for which there were no funds. The local landmark authorities refused to permit demolition of the building thereby forcing the church to sell the land, encumbered by its "white elephant", for a fraction of its value to a developer who agreed to preserve the building. However, the developer was able to gut the building and leave it unprotected because the authorities did not enforce their landmarks ordinance against him. As a result, it was destroyed by a fire. Thus, through the device of the landmarks ordinance, the developer profited on the church's property.

In Cleveland, Ohio, St. Joseph's Church, a cavernous structure, was totally unsuited for the parish whose membership had declined through demographic changes. In 1986 the parish was closed and the Diocese decided to sell the site and apply the proceeds to further the spiritual and human needs of people in other parts of the Cleveland. The local landmark authority declared the Church to be of historic significance on the grounds that it was the sole remaining building in a neighborhood which had been otherwise destroyed. It was the government itself, however, which had destroyed the neighborhood by demolishing buildings for the construction of roadways and a community college, presumably paying owners fair compensation for their

² This law is embodied in The New York City Administrative Code, Chapter 8-A, §§ 25-301 - 25-321, and is referred to herein as the "Landmarks Law". All "§" references are to this Law.

condemned properties. The church received no compensation but instead is burdened with added expense and liability. To date, the City has resisted every attempt of the Diocese to demolish the unsafe structure, preferring architectural aesthetics to human life. Thus, the church is forced to retain a derelict, and is deprived of the resources needed for religious use in other parts of Cleveland.

In Oakland, California the Cathedral and a parish church were ravaged by the devastating earthquake of October 1989. The cost of repairing these structures exceeds \$9 million. The City delayed the issuance of demolition permits, to which the Church was legally entitled, in order to allow time for the two buildings to be landmarked so as to establish governmental control over the properties, thereby depriving the Church of its right to demolish and reconstruct the churches as it saw fit in light of the spiritual and ministerial needs of the religious community.

In Santa Rosa, California, the Diocese desires to make some of its churches seismologically safe. This, of course, would change the appearance of these structures. The preservationists, using the local landmarks ordinance, are blocking this. To the preservationist mind, the preservation of an old building is of greater value than the preservation of human life.

Every governmental action chronicled above would be "legal" under the New York City Landmarks Law.

The above examples geographically represent a cross section of the nation but numerically represent only the tip of the iceberg. All paint a portrait of a stark religious future for religious bodies if unjust preservation laws are allowed to continue to freeze in perpetuity their real property which is their major, and often only, significant material resource.

The Supreme Court of the State of Washington decided that the landmarking of a Seattle church was an unconstitutional interference with the free exercise of religion. *First Covenant Church of Seattle v. City of Seattle*, 114 Wash. 2d 392, (1990), cert. pending. The City of Seattle has now petitioned the Court

for a writ of certiorari, further evidencing the great importance of this issue, nationwide.

Granting that the cause of historic preservation is, if justly and constitutionally activated, a legitimate governmental interest, it is far from the highest governmental interest and ranks well below the governmental interest in preserving religious freedom, in encouraging private-sector human welfare programs, in preventing confiscation of private (religious) resources, and in preventing disparate and unjust treatment as among equally situated owners. These interrelated constitutional interests affecting citizens, especially the poor, in every State of the Union were disregarded by the Court of Appeals and have never before been considered by this Court in a land use case.

II. The Writ Should Be Granted to Review the Denial of Petitioner's First Amendment Claims

A. The New York City "Landmarks Law" Constitutes an Interference with the Ability of Petitioner and its Congregants to Freely Exercise Their Religion.

A most fundamental religious belief of St. Bartholomew's and of all Christian faiths is lampooned in the City's brief to the Court of Appeals which states: "Plaintiff (St. Bartholomew's) does not contend that it is theologically compelled to build the 47 story office building", (p. 29). If, in a given time and place, that is what should be done in order to release religious resources to serve religious purposes, that is precisely what petitioner and its supporting *amici* do contend. Likewise, the Court of Appeals, in equally offensive language, trivialized St. Bartholomew's stated faith belief by stating: "(N)o one seriously contends that the Landmarks Law interferes with substantive religious views." (Dec., p.12). No one, that is, except St. Bartholomew's whose property is at risk, and it's supporting *amici* who speak for a very broad spectrum of Jewish and Christian faiths in our nation.

Since the City and the Court of Appeals deign to evaluate our "religious views" as being not substantial, thereby determining that our religious profession is made in bad faith, we feel

it necessary to explain in some detail the centrality of the religious teaching at issue in this case.

The question is: Is it merely optional or is it mandatory upon Christian communities to use for religious purposes *all* resources contributed to them? Put inversely, would it be contrary to religious teaching for a Christian community to allow a portion of Church resources to be used to support a non-religious value system, or even to lie fallow?

The "substantive religious view" of all Christian Churches is that *all* resources dedicated to religious use must be used for religious purposes. The "substantive religious view" of the City is that religious resources may, under penalty of criminal fines and imprisonment, be forced by the government to lie fallow, i.e., to serve the cause of historic preservation.

For Christians, the definitive answer to this question is given by Jesus Christ in His "Parable of the Ten Gold Coins", sometimes referred to as "The Parable of the Talents". In this Parable a nobleman, prior to leaving for a distant country to be made king, gives three chosen servants ten gold coins each, commanding the servants to "(e)ngage in trade with these until I return". Upon his return as king, he praised the two servants who had gained an increase through trade and condemned the third servant who had let his coins lie fallow and unproductive. Gospel of Luke, chapt. 19, verses 11-24; see also, Gospel of Matthew, chapt. 25, verses 14-27³.

The teaching of Jesus Christ in this Parable is deeply rooted in the ancient Judaic wellsprings of the Christian faith. Thus, in the Book of Exodus, God says: ". . . all the earth is mine." (chapt. 19, verse 5(b)). In the 1st Book of Chronicles, chapt. 29, verse 11(b), King David prays: ". . . For all in heaven and earth is yours; (f)or everything is from you, and we only give

³ All biblical quotations herein are from *The New American Bible*, Catholic Book Publishing Co., New York, 1970. The texts are virtually the same in the modern bible translations used by all major Christian faiths.

you what we have received from you . . .". These are but a few of the many Biblical texts that teach that Christian communities and their leaders may not allow *any* of their dedicated assets to be diverted from God's purposes.

What are God's purposes? For the Christian they are worship of God and service to those in spiritual, economic, medical or other need. This is embodied in the strong words of Jesus Christ: "I assure you, as often as you did it for one of my least brothers (specifying the hungry, the sick, the impoverished, the disadvantaged), you did it for me." Gospel of Matthew, chapt. 25, verse 40.

This teaching, that no dedicated resource is exempt from religious useage, especially for those in need, is strongly emphasized in the worldwide public prayers of both the Roman Catholic and Episcopal Churches. Thus, in the Episcopal *Book of Common Prayer*^{*}, there are a number of prayers for public worship, such as the following:

"(Lord), (g)ive us a reverence for all the earth as your own creation, that we may use its resources rightly in the service of others and to your honor and glory."
(p. 388).

"For the just and proper use of your creation; for the victims of hunger, fear, injustice, and oppression."
(p. 388).

Likewise, in the worldwide public prayer of the Roman Catholic Church, the following litany is offered: " . . . We are people of light giving food to the hungry . . . clothing the naked and sheltering the homeless"[†]

In Christian belief, buildings and real estate have absolutely no status except to the extent they are promoting divine worship and human service programs. In fact, for the Christian,

* *The Book of Common Prayer* (Episcopal), The Church Hymnal Corporation, and the Seabury Press, New York, 1979.

† *Seasonal Missalette*, "Penitential Service", Vol. 6, No. 4, p. 49 (1991), J.S. Paluch Company, Inc., Schiller Park, Illinois, published annually. See *The Roman Missal-Lectionary For Mass*, Catholic Book Publishing Co., New York, 1970, *passim*, for the assignment of such scriptural readings for public worship.

the "temple" is no longer a building but is the body of believers functioning together with Jesus Christ as the Head. The Apostle Paul, in his letter to the Christian community at Ephesus, explains this: "Through him (Jesus Christ) the whole structure is held together and grows into a temple sacred in the Lord; in him you are also being built together into a dwelling place of God in the Spirit." Chapt. 2, verses 21-22. See also, Gospel of John, chapt. 2, verses 18-22; Paul's Letter to the Church at Colossae, chapt. 1, verses 18(a), 24(b).

For the Christian, theory and exercise are one and the same, following the Biblical command: "Act on this word. If all you do is listen to it, you are deceiving yourselves." Letter of James, chapt. 1, verse 22. The Court of Appeals, in using the expression "substantive religious views", attempts to befog the Bill of Rights' guarantee which is, not that we may freely hold religious views, but that we may freely "*exercise*" those views.

The teaching evidenced by the foregoing Biblical passages and official prayers may be summarized as follows: The chosen leaders of every Christian community must diligently use *all* resources held by the church to promote the worship of God and service to fellow humans, especially the poor. Buildings (temples) have no value in comparison to the worth of our fellow humans. When a religious building has, due to societal, financial, population or other changes, ceased to be useful to serve the mission of the church, it is to be, as necessary, altered or demolished. The Landmarks Law forces a religious community and its leaders to hold and manage religious resources in perpetuity, as custodians of a shrine to the Spirit of Architecture.

When a building erected to serve a Christian community instead becomes its master, we have what is, in Christian belief, idolatry — the exaltation of things above God and above humans made in His image. This is, of necessity, the religious position of the City and its preservationist *amici* in this case although, to obscure that fact, they blithely say that "The (Landmarks) Commission does not in any way involve itself in defining the group's mission or defining its priorities". [City's brief below, p. 37]. Yet in forcing the use of religious resources to support a non-religious purpose that is precisely what the City does.

We have summarized this religious teaching for the exclusive purpose of showing that the Landmarks Law heavily impacts, not an obscure theological theory, but a basic teaching proclaimed in the Bible and in the worldwide public worship of petitioner and the Roman Catholic Church and indeed of all Christian faiths. We are under no obligation to justify this teaching. Those who differ are rightly free to use their own resources in a different priority without any economic or other pressure from the government. It is not within the competency of any municipality or court to nullify this teaching by labelling it as not one of Christianity's "substantive religious views", so as to assign, even to a church's own bricks and mortar, a higher priority than the church itself assigns. In short, the Church receives its missional priorities from God, not from the government.

The absolutist priority of the theology of the City is best revealed in the statement in the City's brief below that "(O)nce a building (the Community House) is razed it is lost to all future generations." (p.35). Thus, the loss of one small, undistinguished, subsidiary building out of the 14,700 existing City landmarks is posited as an ultimate loss, transcending the spiritual and human loss to all those present and future generations who can never be served because millions of dollars otherwise available for such ministries have been diverted by the government without compensation and under criminal penalties to serve the non-religious cause of historic preservation. In this, the City shows little hesitancy in leaping over the wall of separation between church and state. This is a clash between religious humanism and in-humanism, using religious resources, by governmental force, to finance the latter value-system.

The City claims that the "fact" that St. Bartholomew's acquiesced in the landmarking of its underlying land and buildings is of great importance. [City's brief below, p. 32.] The Court of Appeals also thought this of significance. [Dec. p.6]. The necessary implication is that what the church now claims to be a basic Christian teaching mandating full religious use of dedicated resources was not deemed a basic teaching at the time of the landmarking or subsequently, i.e. that the church's claim at this "late date" that its teaching is basic is hypocritical, inconsistent and in bad faith. In fact, there is no inconsistency

whatsoever. The church initially acquiesced in its designation only because induced to do so by a promise given by the Landmarks Commission. In its Designation Report, the Landmarks Commission said:

"By this designation of the Landmark and the Landmark Site, it is not intended to freeze the structures in their present state or to prevent . . . the erection of other structures to meet the church's requirements in the future."⁶

By 1980 the "church's requirements" *had* changed by reason of gradual change over the years in population, financial conditions and, especially, new societal needs. In that year the Church realized the Community House had outlived its usefulness and had become a retardant to the Church's mission, especially in view of the more recent and disproportionately large increase in the value for religious programs of the underlying land (the "landmark site"). It has been embroiled with the Landmarks Commission ever since, because that Commission dishonored its original promise.

It is wholly consistent with this teaching on the full religious utilization of dedicated resources that churches comply at their own expense with traditional "police power" governmental regulations because it would be considered wrongdoing for a church to maintain a building as a "nuisance", i.e., as a firetrap or in an unsafe or unsanitary condition, dangerous to human life, health or morals. This is because Christians value human life and welfare as a principle absolutely superior to the preservation of even their own bricks and mortar. The applicable Biblical text is, in words of Jesus Christ, "then repay to Caesar what belongs to Caesar and to God what belongs to God", Gospel of Luke, chapt. 20, verse 25(b), in that Caesar (the government) is, in such cases, acting to protect human life and health.

We ask this Court to recognize as fundamental the distinction between requiring those who have endangered the public welfare by creating a "nuisance" to remedy it at their own

⁶ Designation Report, March 16, 1967, p. 4.

expense and requiring those who have freely conferred a benefit on the public in the form of a distinctive building to maintain that benefit in perpetuity when its maintenance has come to be an impediment to the religious worship and ministry the building formerly promoted.

Likewise it is fully consonant with the teaching on full religious utilization of dedicated resources that the churches comply with zoning laws of immediate and equal applicability to all owners within a rational zone because each owner benefits from the identical restrictions imposed on his neighbor — the “reciprocity of advantage” referred to in the dissenting opinion in *Penn Central*, 383 U.S. at 140. In fact, St. Bartholomew’s asks only to be permitted to build a legal building in compliance with the zoning law, just as its commercial neighbors who, though eligible for landmarking, have not been landmarked, who put their profits into their own pockets instead of returning them to the community through religious and human welfare services and who have never provided low-rise buildings for the free enjoyment of all.

The issues presented above profoundly affect the future of all religious communities in this nation and those they serve, and have never before been presented to the Court in a land use case.

B. The Governmental Interference with the Free Exercise of Religion in this Case Is Substantial.

The Courts below held that there can be no “free exercise” violation (and no “unconstitutional taking”) so long as the Church can continue its present operations in its present Community House. St. Bartholomew’s, in its Petition, makes it clear that these holdings are erroneous, (pp. 21-28). However, for an additional reason not heretofore considered, the Court of Appeals erred in this regard in that it necessarily, but incorrectly, assumed that the Landmarks Law impacts only the “landmark” i.e., the Community House. This is not so. Far more significantly, the Landmarks Law requires the Landmarks Commission, when it designates a “landmark” (building), to also designate, and fix the boundaries of, a “landmark site” (underlying land). §25-303 b.

In addition to the "landmark" itself, all other "improvements" (such as St. Bartholomew's terrace gardens) and all future buildings on this underlying land are subject to control by the Landmarks Commission in perpetuity whether or not these improvements are 30 years old, and without any need to allege their "special character". §25-304 b.; §25-305 a.(1); §25-306 a.(1); §25-307 a., c. This is how the Landmarks Commission can seek to dictate the size, shape and appearance of the future building proposed by St. Bartholomew's for the "landmark site" even though it would not be 30 years old and does not yet have any "special character". Thus, the heart of the Landmarks Law is the power of the City to control a tract of underlying land, the "landmark site", not merely the "landmark" on it, through all future generations to serve the present and future "needs" of historic preservation. Inconsistently, the City now asks the Court to consider only the value and useability of the "landmark" when assessing the impact of the Landmarks Law on the Church's ability to carry on, expand, change and/or relocate its religious mission now and in the future. Under a proper construction of the Landmarks Law, the proper measure of its impact on petitioner is the lost value of the "landmark site" (the underlying land), which is over 85% of the value of the building lot ("landmark site") on which the Community House stands. This loss is estimated at about \$140 million. Petitioner and its congregants are now compelled to administer this resource in a manner incompatible with their religious beliefs. This, we submit, constitutes a most serious interference with the ability of the congregants and leadership's to freely exercise their religion.

This Court in *Penn Central* did not consider this basic point in its evaluation of what is or is not "taken".

C. Because the Landmarks Law is Not a Law of General Applicability the City Must Show, But Has Failed to Show, a Compelling Governmental Need to Interfere With the Free Exercise of Religion.

1. The Landmarks Law is Not a Law of General Applicability.

The Court of Appeals below erroneously characterized the landmarks law as a law of "general applicability" saying it applies

to '[a]ny improvement, any part of which is thirty years old or older, which has special character . . .'. (Dec. pp. 12-13). In fact, nothing could be further from the truth. The Landmarks Law applies only to that portion of all eligible sites and districts that have been selected for landmarking from time to time in the unfettered caprice of the Landmarks Commission which is limited by no meaningful standards⁷. The vast majority of eligible sites have been ignored, while some eligible sites have inexplicably been rejected for, or freed from, landmarking, as noted below.

The Landmarks Commission has not landmarked the world-famous Cathedral of St. John the Divine in Manhattan, but has landmarked many humdrum apartment buildings.

When a unique treasure of great historical significance was recently found in the form of the virtually intact hull of a large 18th Century, American-built merchant ship, the Landmarks Commission staged a parade in honor of the find but let the developer proceed to destroy it by erecting an office tower on the site because it would have been too expensive (for the developer) to save the hull.

The Landmarks Commission permitted Marymount School, housed in three famous Manhattan beaux-arts mansions, to install a huge, ugly "bubble" gymnasium on top of the mansions on the grounds that the School would otherwise suffer the statutory "insufficient return", despite the fact that the School was fully capable of carrying out its existing programs in its existing building and was not required to show that, through a fund-raising program, it could not increase its profitability to overcome its "insufficient return". One may only speculate why St. Bartholomew's was not accorded "equal protection" in each of these areas.

St. Bartholomew's is itself an example of the lack of general applicability of the Landmarks Law. Every building on the City block that includes St. Bartholomew's, other than St. Bartholomew's, is built to fully exploit the value of its underlying

⁷ To be eligible for landmarking, it is necessary only that a building have at least some "special character" — a phrase so vague that virtually no building can be said to be ineligible. Characteristics of historicity or aesthetics are not necessary for landmarking. §25-302 n.

land. These buildings "dwarf" St. Bartholomew's Church and are crassly incompatible with its architecture. St. Bartholomew's now proposes to build a compatible building in place of a very undistinguished landmark (the Community House), but is prevented by the Landmarks Commission because its proposed new building would dwarf the already-dwarfed church structure.

Other examples of such "legal", but capriciously inconsistent, decisions abound. Nothing in the Landmarks Law prevents the Landmarks Commission from so acting. Thus, this is not an instance of a good law wrongly applied, but of a bad law "legally" applied.

In *Penn Central*, this Court stated "[L]andmark laws are not like discriminatory, or 'reverse spot' zoning . . . which arbitrarily singles out a particular parcel for different, less favorable, treatment than the neighboring ones". 438 U.S. at 132. In the light of the foregoing examples, we respectfully submit that this statement is factually incorrect, recognizing that the detailed operation of the Landmarks Law apparently was an area not seriously contested in that case. The quoted words, on the contrary, accurately describe what has happened to St. Bartholomew's.

In *Penn Central*, at p. 132, the Court further stated that the New York City Landmarks Law "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the City". 438 U.S. at 132. Again, we respectfully submit that this statement is factually incorrect. There is no requirement that a building or a historic district have "historic or aesthetic interest" — merely that they have at least some "special character". Further, the arbitrary and capricious selectivity of the Landmarks Commission, briefly noted above, shows there is no City-wide "comprehensive plan." Thus, the Landmarks Commission Chairperson has publicly announced that the Commission, having concentrated on Manhattan for its first 25 years, will now seek to concentrate on the other four boroughs⁶. The landmarks law permits

⁶ Presentation of the Chairperson of the Landmarks Preservation Commission to the Real Estate Board of the City of New York, April 16, 1990.

this, thereby further demonstrating the lack of a comprehensive city-wide plan, i.e., a lack of general applicability.

The City has erroneously proffered several cases as precedent, but these cases are not relevant because they all involved laws that, unlike the Landmarks Law, were in fact laws of general applicability as the following summaries show.

In Jimmy Swaggart Ministries v. Board of Equalization, 110 S.Ct. 688 (1990), the law imposed a specified, immediately applicable tax on *all* sales of certain articles. In *Braunfeld, et al. v. Brown, Commissioner of Police of Philadelphia, et al.*, 366 U.S. 599 (1961), the law was applicable upon its effective date to *all* businesses which thereupon had to close on Sundays. In *Employment Div., Department of Human Resources of Oregon v. Smith*, 110 S.Ct. 1595 (1990) the law prohibited all use of specified drugs (including peyote), not excluding religious use, and was effective immediately as to all persons⁹. In *Lyng, Secretary of Agriculture, et al v. Northwest Indian Cemetery Protective Assn., et al.*, 485 U.S. 439 (1988), the government built a road on its own land near an Indian burial and religious area, an action that made an immediate and equal benefit available to all members of the public¹⁰.

Each of the above cited cases involved a law that had objective, ascertainable criteria by which future conduct could be clearly governed, and each was immediately and simultaneously applicable to all covered persons or transactions. In sharpest contrast, upon the effective date of the Landmarks Law, nothing became landmarked because the law merely authorizes the

⁹ We submit that, in addition, *Smith* is inapplicable in this case for the reasons set forth in petitioner's brief herein.

¹⁰ Furthermore, in *Lyng* the government was dealing with its own land. In the St. Bartholomew's situation, however, the government imposed a burden on private property that destroys for religious purposes about 85 % of the value of the "landmark site".

future landmarking of districts and buildings and, simultaneously, of the land under and/or surrounding those buildings, at the future whim of the Landmarks Commission which is constrained by no meaningful criteria and is under no duty to act. The Landmarks Law permits the Landmarks Commission to pick and choose its victims by landmarking one building with "special character" and ignoring its equally eligible neighbor — which is precisely what has happened to St. Bartholomew's.

Finally, a law cannot be said to be of "general applicability" when it can "legally" be applied to one eligible property or district in, say, 1967 and not to another eligible property or district until 25 or 125 years later, or not at all.

2. There Is No Compelling Governmental Need In This Case To Interfere With The Free Exercise Of Religion.

Because the Landmarks Law is not a law of general applicability, the City has the burden to prove that there is some compelling governmental need to block the demolition of St. Bartholomew's Community House¹¹. The City has made no attempt even to address this burden. For example, promotion of tourism is one of the stated objectives of the Landmarks Law, §25-301, but the City offers no showing that there would be any decline in tourism if the building were demolished.

In fact there is no such need. The Community House is a small subsidiary building, the name of whose architect is, if known, never mentioned. It is said merely to be consonant in style with the nearby church building and no independent characteristic is ascribed to it. A far larger and more sophisticated example of the same architectural style (St. Bartholomew's church building) will remain on the "landmark site" for the free enjoyment of the public. The Community House is one of the more unimpressive of the 14,700 landmarked structures in the City. The need to preserve this small building, in competition with

¹¹ There are additional reasons why the City has this burden. See petitioner's brief herein, p. 13.

the resultant great loss of religious and human welfare programs and tax revenues, is insignificant.

The City itself rates its need for landmarks very low as it is notorious for allowing the landmarks it owns to deteriorate.

In a City (and nation) experiencing increasing difficulties in providing affordable housing and basic medical care for the poor, in rehabilitating drug addicts, and in providing for the needs of abused children, battered women and other crime victims, we cry out against a law that, for aesthetics, hamstring the religious community which is, by far, the chief private-sector provider of help to these persons and, if quality be taken into account, perhaps an even greater provider than the City itself. We cry out against a fiscally fragile City government that is curtailing education, closing firehouses and reducing basic services but yet defends a law that causes the abandonment of \$5 million per year² in potential real property taxes to preserve a minor landmark to please an aesthetically sensitive, but humanly insensitive, minority. There is no governmental "need", much less a compelling need, to preserve this state of affairs.

D. The Landmarks Law Necessitates an Unconstitutional Governmental "Entanglement" With Religion.

A reading of the decisions of the District Court, the Court of Appeals and the City's brief below should amply indicate the extraordinary involvement of the government in participating and controlling the day-to-day decisions of a religious body in the prioritization of its expenditures and the control of its plans for the modification and expansion of its religious programs. Particularly entangling is the requirement that St. Bartholomew's require its members to participate in a forthcoming fundraising campaign of indefinite duration, which would have to be monitored by the Landmarks Commission to insure that all the donations received were used for historic preservation and not for any religious purpose. The Church members would

² This figure is a conservative estimate of the annual real property tax that would be generated by St. Bartholomew's proposed new building to prevent unfair competition with the commercial sector.

thereby be effectively converted into a historic preservation society — contrary to their substantive religious beliefs. Further, the fact that the Landmarks Law purports to control the Church's underlying land (the "landmark site") in perpetuity means that the size, shape and appearance of all future buildings on that site, as well as the Church's future plans for the alteration or demolition thereof, would be subject to the control of the non-neutral Landmarks Commission.

The provisions of the Landmarks Law create such a preservationist bias and are so lacking in objective standards, in economic reality and in meaningful time-frames that only in a case of extreme emergency would a religious owner embark upon this costly and futile process which gives no hope of relief at the administrative level. The chilling effect of the Landmarks Law upon religious freedom is shown by the fact that, in the 25-year history of the Law, no religious building has ever been freed of landmarking and no religious owner has ever had its desired alteration plans approved.

If the foregoing does not evidence unconstitutional "entanglement", nothing does.

III. The Writ Should Be Granted to Review the Denial of Petitioner's Fifth Amendment "Takings" Claim.

New York City has, without compensation, destroyed, for religious usage, about \$140 million, consisting of over 85% of the value of the building lot (part of the "landmark site") on which the petitioner's Community House (the "landmark") stands. We submit that the sheer magnitude of the loss constitutes this as a "taking". This is discussed in greater detail above at Point II. B. and in petitioner's brief herein.

That property of great value is actually "taken" from St. Bartholomew's is particularly shown by the fact that the Landmarks Law forces the Church to donate a major economic benefit to its commercial neighbors whose full-zone buildings command much higher rents because they enjoy the light, air and views made possible only by the low size of their landmarked neighbor.

Such "easements of light and air" are marketable commodities often selling for millions in New York City. Commercial developers have not been slow to support the landmarking of their "neighbors". For example, the owners of the tall building at 90 Broad Street in Manhattan use the renting slogan, "Where The Landmarks Protect Your Light" and explain that their tenants' "wraparound sunlight and views are protected by the landmark Fraunces Tavern block"¹³. An owner of a commercial high-rise adjacent to St. Bartholomew's has likewise vigorously objected to the de-landmarking of the Community House. This shows that, in addition to constituting an uncompensated "taking", the Landmarks Law, unlike a zoning law, provides no reciprocity of advantage and is not a law of equal applicability.

In *Nollan et ux. v. California Coastal Commission*, 483 U.S. 825 (1987) this Court has held that even owners not constitutionally protected from governmental interference could not be required to donate an amenity (easement over their beachfront property) to the public in return for a permit to build a legally, zoned beachfront house. Through the Landmarks Law the City deprives a (religious) owner of its right to build in compliance with the zoning law and forces that owner to contribute an amenity (landmarked building) to the public in return for nothing, and further fossilizes the owner's underlying land (the "landmark site") so as to make it unavailable for religious uses and further burdens the owner with the extra costs, (over and above its obligation not to create a "nuisance"), of preserving the original appearance of the amenity.

¹³ Illustrated mailing of Jones Lang Wootton, renting agents for 90 Broad Street, Manhattan.

Conclusion

In the formative years of our Republic, the Court posed the question: "To what purposes are powers limited, and to what purpose is that limitation committed to writing if these limits may, at any time be passed by those intended to be restrained?". *Marbury v. Madison*, 5 U.S. (1 Cranch), 137, 138 (1803) (Marshall, C.J.). What, then, is this Court to say today of a law that confers on a governmental commission power without limits to arbitrarily select owners to be landmarked and to exempt other eligible owners — of a law that penalizes benefactors of society and rewards non-benefactors — of a law that values structures more than human needs — of a law that, diverts religious resources to finance a non-religious cause — of a law that trivializes basic religious beliefs and compels believers to conduct themselves in a manner violative of those beliefs.

To consider this novel combination of interrelated issues, and for all the reasons set forth herein and in petitioner's brief, your *amici* respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1990



THE RECTOR, WARDENS AND MEMBERS OF THE VESTRY OF
 ST. BARTHOLOMEW'S CHURCH,

Petitioner,

—against—

THE CITY OF NEW YORK AND THE LANDMARKS PRESERVATION
 COMMISSION OF THE CITY OF NEW YORK,

Respondents.

BRIEF *AMICI CURIAE* OF THE NEW YORK STATE INTER-FAITH COMMISSION ON LANDMARKING OF RELIGIOUS PROPERTY, THE COUNCIL OF CHURCHES OF THE CITY OF NEW YORK, THE QUEENS FEDERATION OF CHURCHES, THE NEW YORK STATE COUNCIL OF CHURCHES, THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., THE NATIONAL ASSOCIATION OF EVANGELICALS, THE NEW YORK BOARD OF RABBIS, DEPARTMENT OF CHURCH IN SOCIETY, DIVISION OF HOMELAND MINISTRIES, CHRISTIAN CHURCH (DISCIPLES OF CHRIST), AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE REFORMED CHURCH IN AMERICA AND JAMES E. ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) IN SUPPORT OF THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Under the holding of *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), whether a State may require a religious organization to expend its limited funds to support the secular, aesthetic interests of the State?

2. Under the holding of *Employment Division v. Smith*, whether a State may use a "neutral" law to dictate how a religious organization fulfills its religious mission whenever that religious organization owns property that is aesthetically pleasing to the State?

3. Whether a landmark's law that permits a State to favor one religion over another and scrutinize the manner in which a religious organization fulfills its religious mission violates the Establishment Clause of the First Amendment?

4. Whether a State possesses any "legitimate State interest" in the aesthetic qualities of property owned by a religious organization that would permit the State to force such an organization to maintain its property solely to preserve the State's aesthetic interest, at no cost to the State, without effecting a taking of the property?

5. Whether a State may freeze a religious organization's use of its property, regardless of whether that use continues to fulfill the religious mission of the religious organization, without effecting a taking of the property?

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INTRODUCTION

The New York State Interfaith Commission on Landmarking Religious Property, The Council of Churches of the City of New York, Inc., The Queens Federation of Churches, The New York State Council of Churches, The National Council of Churches of Christ in the U.S.A., The National Association of Evangelicals, The New York Board of Rabbis, Department of Church in Society, Division of Homeland Ministries, Christian Church (Disciples of Christ), Americans United for the Separation of Church and State, The Reformed Church in America and James E. Andrews As Stated Clerk Of The General Assembly Of The Presbyterian Church respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit (the "Second Circuit") filed by petitioner The Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church ("St. Bartholomew's" or the "Church").

As religious organizations¹, the *amici curiae* have a direct, fundamental interest in the dispute between St. Bartholomew's and the City of New York that is the subject of the decision issued by the Second Circuit on September 12, 1990 in this action.² In that decision, the Second Circuit erroneously determined that the holding of this Court in *Employment Division v. Smith*, 110 S. Ct. 1595 (1990) ("*Smith*"), granted the City of New York absolute power to require religious organizations to expend their limited funds to support the aesthetic interests of the City of New York over their religious beliefs whenever such support was required by a "neutral" law. The Second Circuit further misinterpreted the holding of *Smith* to empower the City of New York to use a

1 The interests of the *amici curiae* are detailed in Exhibit A to this memorandum.

2 *The Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. The City of New York, et al.*, 914 F.2d 348 (2d Cir. 1990).

“neutral” law to dictate how a religious organization fulfills its religious mission whenever the religious organization owns property that is subject to the application of the New York Landmarks Preservation Law (the “Landmarks Law”).³ Moreover, the Second Circuit ignored the gross entanglement in the affairs of religious organizations that results from the operation of the Landmarks Law. Finally, the Second Circuit mistakenly held that the State possesses a “legitimate State interest” in the aesthetic qualities of property owned by a religious organization and that as long as the Church is able to use its existing property to carry out its religious mission in any minimal fashion, the City of New York has not engaged in an unconstitutional taking of St. Bartholomew’s property.

The breadth of the Second Circuit’s errors threaten the religious liberty interests of the *amici curiae*. If not reviewed by this Court, the Second Circuit’s interpretation of *Smith* threatens the ability of every religious organization that owns any property that a State deems to be aesthetically pleasing to carry out its religious mission without interference or supervision by that State. If left standing, the Second Circuit’s decision permits any State to superimpose its aesthetic values—its secular spirituality—upon the religious values of any religious organization that owns property subject to a landmarks law and force that religious organization to expend its limited funds to support the State’s interests in secular spirituality *before* it may spend any monies in support of its religious mission. The Second Circuit’s decision further empowers any State to prefer and endorse the architectural achievements that emanated from past expressions of religion over the current missions of the religious organizations that own these properties. If left intact, the Second Circuit’s decision permits the City of New York to freeze any architecturally significant property owned by religious organizations without any compensation to the religious organizations so long as the burdened property could be put to any minimal

3 N.Y.C. Administrative Code, Ch. 8-A, Section 205-1.0 *et seq.* (1979) (revised Administrative Code, Ch. 3, Section 25-301 *et seq.* (1985)).

religious use. The *amici curiae* find such legal results profoundly disturbing and a shocking, unconstitutional expansion of the State's power over religious organizations.

No other civil regulatory scheme interferes so directly with the constitutional rights of religious organizations or burdens religious organizations so disproportionately as the landmarks laws enacted by various states. By providing the state with the opportunity to exert power over houses of worship, these laws represent a dangerous breach in the constitutional wall separating church and state.⁴

This constitutional debacle is not limited to actions taken by the City of New York. The Supreme Courts in the States of Massachusetts and Washington have recently overturned similar landmarking statutes in order to protect religious liberty interests. See *Society of Jesus of New England v. Boston Landmarks Commission*, 408 Mass. 38 (1990); *First Covenant Church v. City of Seattle*, 114 Wash. 2d 392, 787 P.2d 1352 (1990) (*en banc*), petition for certiorari filed, December 6, 1990, Docket No. 90-892.

For the reasons set forth below, and the reasons contained in the petition for a writ of certiorari submitted by St. Bartholomew's, the *amici curiae* respectfully request that this Court review and reverse the decision of the Second Circuit and that judgment be entered in favor of St. Bartholomew's.

4 Unfortunately, it is a breach that the State has stepped through many times: church and synagogue buildings have been individually designated as landmarks in New York City at a rate forty-two times higher than the proportion of church and synagogue buildings to all buildings in New York City. N.J. L'Heureux, "Ministry vs. Mortar: A Landmark Conflict," reprinted in D. Kelley, ed., *Government Intervention in Religious Affairs, II* (Pilgrim Press N.Y. 1986), at 168.

REASONS FOR GRANTING THE WRIT

THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT PROTECTS RELIGIOUS ORGANIZATIONS AGAINST THE INVOLUNTARY EXPENDITURE OF MONIES DESIGNED TO PROMOTE THE AESTHETIC INTERESTS OF THE STATE

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment or religion, or *prohibiting the free exercise thereof . . .*" U.S. Const. Am I (emphasis added). The "exercise" of religion includes not only the right to believe and profess whatever religious doctrine one desires, but also the right to take actions that are "rooted in religious belief." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). This Court has observed that "belief and action cannot be neatly confined in logic-tight compartments." *Id.*, 406 U.S. at 220. Indeed, in the view of the *amici curiae*, since the State cannot regulate a person's thoughts, it is the right to act on religious beliefs that constitutes the most meaningful protection offered by the Free Exercise Clause of the First Amendment.

This Court has warned federal courts not to "dissect" religious beliefs to determine whether specific conduct truly involves the practice of religion because courts are "singularly ill-equipped" to resolve intrafaith differences or to interpret scripture. *Thomas v. Review Board*, 450 U.S. 707, 715-16 (1981). Rather, courts should merely determine whether the conduct in question is "rooted in religion." *Id.* at 713. *See also Holy Spirit Ass'n v. Tax Commission*, 55 N.Y.2d 512, 527-28, 450 N.Y.S.2d 292, 298, 435 N.E.2d 662, 668 (1981) ("It is for religious bodies themselves, rather than the courts or administrative agencies, to define, by their teachings and activities, what their religion is.") Therefore, every activity that advances the missional objectives of a reli-

gious organization is protected by the Free Exercise Clause of the First Amendment.⁵

In this case, however, the Second Circuit held that this protection is absolutely meaningless, according to its interpretation of *Smith*, whenever a State enacts a "neutral" law that prohibits or restricts the religious activities of a religious organization. 914 F.2d at 354. Rather, the Second Circuit held that a State law violates the Free Exercise Clause of the First Amendment only if there is "a showing of discriminatory motive, coercion in religious practice or the Church's inability to carry out its religious mission in its existing facilities." 914 F.2d at 355. Thus, according to the Second Circuit, a State can enact any "neutral" law for any purpose whatsoever and, as long as one priest can still minister to one parishioner, the State has not violated the Free Exercise Clause of the First Amendment.

The holding of this Court in *Smith* cannot be interpreted as such a complete evisceration of the Free Exercise Clause's protection of religious conduct. In *Smith*, this Court upheld the right of Oregon to enact criminal penalties for the possession of the drug peyote, even if the peyote was used in a sacramental ceremony of the Native American Church. This Court refused to require Oregon to justify that law as fulfilling a "compelling government interest" for the following reasons:

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." . . . To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is

5 In this case, the District Court properly found that the actions of St. Bartholomew's Church to provide assistance to the homeless, Christian education and preschool programs constituted a part of the *religious mission* of St. Bartholomew's. 728 F. Supp. at 961.

“compelling”—permitting him, by virtue of his beliefs, “to become a law unto himself,” . . .—contradicts both constitutional tradition and common sense.

110 S. Ct. at 1603 (citations omitted). In refusing to apply the “compelling government interest” test, however, this Court did not grant the States the license to regulate any conduct for any purpose, regardless of the impact on religious conduct.

Here, the purpose of the Landmarks Law is to preserve aesthetically appealing buildings. The Landmarks Law does not prohibit any “socially harmful conduct” in any meaningful sense of those words. Moreover, as applied to buildings owned by religious organizations, the purpose of the statute is illegitimate and offensive—no State should be permitted to promote the State’s view of aesthetics at the expense of the religious mission of the religious organization that owns the property. In effect, the Second Circuit’s decision permits the State to enforce the secular spiritual values embodied in aestheticism over the religious values of a particular religious organization.

Moreover, the interference of the Landmarks Law with the ability of a religious organization to fulfill its religious mission cannot be understated. First, the religious organization is required, under threat of criminal penalties, to expend whatever monies are necessary to maintain a landmarked building in its original condition irrespective of whether these expenditures may violate the religious beliefs of the organization by forcing the religious organization to maintain a civic landmark at the expense of its religious mission.

Second, once landmarked, the property of the religious organization may no longer be used to help fulfill the religious mission of the organization solely in accordance with the beliefs of the religious organization if the mission involves any alteration of the structure. Rather, any proposed changes in the structure of the building must be approved by the state and the proposed change may be rejected by the state purely on aesthetic grounds. The religious organization

then remains responsible for maintaining the building on aesthetic grounds, regardless of how obstructive such maintenance may be to the religious mission.

Finally, the religious organization may attempt to obtain "hardship" relief from the state by demonstrating that the failure to permit the proposed change would "prevent or seriously interfere" with the mission of the religious organization. See *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 131, 316 N.E.2d 305, 311, 359 N.Y.S.2d 7, 16 (1974). But, once again, it is the state that determines whether the mission of the religious organization requires the proposed changes in the landmarked building. Thus, rather than lighten the burden on the free exercise of religious beliefs, the hardship application process gives the state the power to minutely investigate and critique the religious organization's mission and the means used by the religious organization to attempt to fulfill that mission.

Moreover, the hardship application process does not permit the religious organization even to attempt to alter a landmarked property to serve a new use. See Section 207-8.0(a)(2). Even where the faith of a religious organization cries out for changes to be made, those pleas must be ignored by the state, and the religious organization forced to maintain the landmarked building in a manner contrary to its religious mission. For example, as a religious community ages, a religious organization could be prevented from altering a landmarked building from use as a pre-school to one more suitable to serving the needs of senior citizens.

Moreover, the facts presented to the District Court demonstrate that the Landmarks Law, as applied to St. Bartholomew's, constituted a particularly severe burden on the free exercise of religion by the Church. As a fundamental component of the exercise of its faith, St. Bartholomew's determined in 1983 that it should utilize a portion of its landmarked property in a new manner that would enable it to meet the needs of its missional programs. By replacing its Community House with a mixed-use office building, the

Church hoped to provide adequate facilities for its existing programs to aid the homeless and provide preschool children's education as well as to raise the monies necessary for essential repairs to the church building itself.

The City of New York responded to the attempt by St. Bartholomew's to exercise its faith in this manner by using the Landmarks Law to completely reject all proposals to construct the new building. At the hearing on its request for hardship relief, St. Bartholomew's Church presented evidence that its community outreach programs for the homeless and its Christian education and preschool programs were adversely affected by the Landmarks Law's grip on its property. These programs are a fundamental part of the Church's religious mission and are supported by the Episcopal Church and the New York Diocese. The Landmarks Law, however, has prevented St. Bartholomew's from utilizing its assets in the manner that it deems appropriate to provide a sufficient level of financial support for these programs.

This Court has recognized that religious organizations need funds to operate and that the use of religious property to produce income enables religious organizations to carry out their religious activities. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), the Court observed that "a religious organization needs funds to remain a going concern" and that a State may not make the exercise of a religious practice so costly as to deprive it of the resources necessary to its maintenance. 319 U.S. at 111-12. In *Murdock*, this Court invalidated a license tax on members of Jehovah's Witnesses who were engaged in the door-to-door distribution of religious literature. Recently, this Court commented that the unconstitutionality of the license tax struck down in *Murdock* stemmed from the fact that the tax "operated as a prior restraint on the exercise of religious liberty." *Jimmy Swaggart Ministries v. Bd of Equalization*, ____ U.S. ____, 110 S. Ct. 688, 694 (1990). Like the license tax struck down in *Murdock*, the Landmarks Law is a prior restraint upon the ability of St. Bartholomew's to carry on its religious mission.

Further, when a religious organization's use of its property, or revenues derived therefrom, will directly advance its charitable and religious purposes, the ownership interest in such property is an asset or resource to be used in the exercise of religious liberty. Thus, in determining whether a statute unconstitutionally burdens the free exercise of religion, the statute's impact on the religious organization's financial ability to carry out its mission cannot be ignored. The Second Circuit admitted that the Landmarks Law "drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs." 914 F.2d at 355. But the Second Circuit simply ignored this direct assault on the religious mission of the Church.

In addition to the direct financial impact on St. Bartholomew's, the Landmarks Law has interfered with the Church's free exercise of its religion in other ways. St. Bartholomew's determined that the Community House was an obsolete structure with an inadequate layout and insufficient space for its activities. The Landmarks Law, however, has prevented the Church from re-constructing the Community House so that the Church may fully carry out its missional programs.

The Landmarks Law has also forced St. Bartholomew's to continue expending substantial funds on the upkeep of a building that it has already determined should be replaced to enable the Church to fulfill its religious mission. Thus, the Landmarks Law has coerced St. Bartholomew's into expending resources in a manner that violates its religious mission.

Therefore, involuntary application of the Landmarks Law to buildings owned by religious organizations, including St. Bartholomew's, must be held to be an unconstitutional violation of the right to free exercise of religion. The Landmarks Law substantially burdens free exercise rights without serving any compelling government interest. For these reasons, this Court should grant the Church's petition for a writ of certiorari and reverse the decision of the Second Circuit.

INVOLUNTARY APPLICATION OF THE LANDMARKS LAW TO PROPERTY OWNED BY RELIGIOUS ORGANIZATIONS VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Where a law creates such a preference, the Court has applied a strict scrutiny standard, upholding the statute only if it is closely tailored to further a compelling state interest. *Id.* at 246.

The Landmarks Law demonstrably prefers certain denominations and religious beliefs over others. Thirty-one of the ninety-five landmarked religious structures in New York City are Episcopal. Because only structures of "special character" and more than thirty years old are subject to the Landmarks Law, more recently established faiths and religious organizations are free from even the threat of the burdens inherent in landmark designation. Thus, these other religious organizations may devote all their resources to the fulfillment of their religious mission while religious organizations such as the Episcopal Church are disproportionately burdened.

In addition, the buildings owned by religious organizations that have been designated as landmarks are the product of those organizations' religious beliefs, not some secular interest in fine design. The beliefs of religious organizations, however, often evolve and change over time, either in response to new conditions in the community or new interpretation of the religious organization's faith. Thus, over time, different faiths and different movements within a single faith will place greater or lesser importance on the construction of architecturally distinctive buildings.

By its very nature, the Landmarks Law permits the State to intervene in this religious debate and permanently tip the scales in favor of those who believe that their faith is best

fulfilled by the continued construction and maintenance of buildings with "special character". The Landmarks Law inherently binds a religious organization to the decision to exercise its faith by constructing an architecturally distinctive building—even if that decision was made seventy years ago and no longer fully and accurately reflects the faith of the religious organization.⁶ Thus, to the extent that it is applied to buildings owned by religious organizations, the Landmarks Law inherently preserves one exercise of religion over any other. Therefore, the involuntary application of the Landmarks Law to buildings owned by religious organizations should be held to be a violation of the Establishment Clause of the First Amendment and the decision of the Second Circuit should be reversed.

The Establishment Clause of the First Amendment also prohibits excessive entanglement of government with religious organizations. *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971). In particular, the Supreme Court has consistently condemned "comprehensive, discriminating and continuing state surveillance" of religious institutions as violative of the Establishment Clause. *Id.*; see *Aguilar v. Felton*, 473 U.S. 402 (1985); *NLRB v. Catholic Bishop*, 440 U.S. 490, 502-03 (1979).

The Landmarks Law, as applied to the request for hardship relief submitted by St. Bartholomew's Church, resulted in exactly the kind of intense government involvement in the internal affairs of the Church prohibited by the Establishment Clause. The Church's decisionmaking process, management, operations and religious mission were all subjected to public scrutiny and comment.

The District Court's decision underscores the entanglement of the State with St. Bartholomew's Church. In the course of reviewing the evidence presented by the Church in support of its application for hardship relief under the Landmarks Law,

6 Ironically, for those religious organizations most interested in maintaining their separation from the state and their autonomy, the most rational reaction to the Landmarks Law is to construct buildings with no "special character" whatsoever.

the District Court criticized various aspects of the Church's planned new structure and made several suggestions as to how the Church should fulfill its religious mission within the confines of its existing finances and physical plant. For example, the District Court suggested that rather than constructing new facilities for feeding the homeless, the Church could use its auditorium or other dining facilities for that program. 728 F. Supp. at 969, n. 22. The District Court also suggested that the Church could make all necessary repairs to its existing buildings by invading its endowment for the most essential work first and spreading the remaining expenditures over a longer period of time. 728 F. Supp. at 971, n. 26. The District Court expressed disappointment in the Church's failure to accept an offer from a Landmarks' Commission witness to assist the Church in carrying out repairs and rehabilitation of the existing buildings, as volunteered by that witness in an attack on the Church's planned new structure. 728 F. Supp. at 971, n. 27.

The sum total of the dictates in the District Court's decision is that the State, not the Church, determines: (a) how the buildings should serve the religious mission of the Church; (b) how the Church should pay for renovation of the building and when repairs should be made; and (c) whom the Church should hire to assist it in making the repairs. Both the District Court and the Second Circuit described this gross entanglement in the affairs of the Church as merely the proper result of a limited "inquiry into church finances" and "architecture". 914 F.2d at 356, n. 4; 728 F. Supp. at 963. Thus, under the cover of a limited "inquiry", the State is given the power to control the internal affairs of the Church—a result that completely violates the autonomy of the Church and the bedrock principle of complete separation of church and state.

The application of the Landmarks Law to St. Bartholomew's Church has led to an intimate and continuing relationship between the Church and the City of New York. This Court has held that such a relationship is unacceptable. *Lemon v. Kurtzman*, 403 U.S. at 620-22. The goal of the

Establishment Clause is the "insulation and separation" of church and State from each other. *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970). As applied to St. Bartholomew's Church, the Landmarks Law violated this goal and the rights of the Church to be separate from the State and completely autonomous in the exercise of its religion. Therefore, the petition for a writ of certiorari should be granted and the decision of the Second Circuit should be reversed.

AS APPLIED TO ST. BARTHOLOMEW'S CHURCH, THE LANDMARKS LAW VIOLATED THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

The Fifth Amendment of the United States Constitution guarantees that private property shall not "be taken for public use, without just compensation." This guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The Supreme Court has noted that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Furthermore, "[i]t is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property . . . , so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner." *Keystone Assoc. v. Moerdler*, 19 N.Y.2d 78, 88, 224 N.E.2d 700, 703, 278 N.Y.S.2d 185, 189 (1966) (quoting *Forster v. Scott*, 136 N.Y. 577, 584 (1893)).

In *Penn Central*, this Court held that the Landmarks' Law did not effect an unconstitutional taking of the Grand Central Terminal because:

Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the property. *More importantly*, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

438 U.S. at 136 (emphasis added).

The Second Circuit, however, held that the only test for determining whether the Landmarks Law has effected a taking of St. Bartholomew's property is whether the Church can "continue its existing charitable and religious activities in its current facilities." 914 F.2d at 356. The Second Circuit went on to hold that the second element of the *Penn Central* test—a "reasonable return"—was not applicable to any building owned for charitable purposes. 914 F.2d at 357. Thus, under the Second Circuit's interpretation of *Penn Central*, for-profit corporations and other commercial ventures possess greater Fifth Amendment rights than non-profit religious organizations.

In contrast to this contorted view of *Penn Central*, the New York Court of Appeals has held that an unconstitutional taking occurs whenever landmark designation of property owned by a non-profit organization "seriously interferes with the carrying out of the charitable purpose" of the organization. *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 455 (1980). This "serious interference" test must be applied to property owned by charitable organizations in order to determine whether the Landmarks Law interferes with the charitable organization's original expectations concerning the use of the property. *Penn Central*, 438 U.S. at 136.

Here, the Second Circuit gave no weight whatsoever to the substantial evidence concerning the devastating interference

of the Landmarks Law with the religious mission of St. Bartholomew's. See Point I, *infra*. Therefore, because the Landmarks Law as applied to St. Bartholomew's Church has seriously interfered with the religious mission of the Church, the petition for a writ of certiorari should be granted and the decision of the Second Circuit should be reversed and judgment be entered in favor of the Church on its Fifth Amendment claim.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully request that the petition for a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: February 1, 1991

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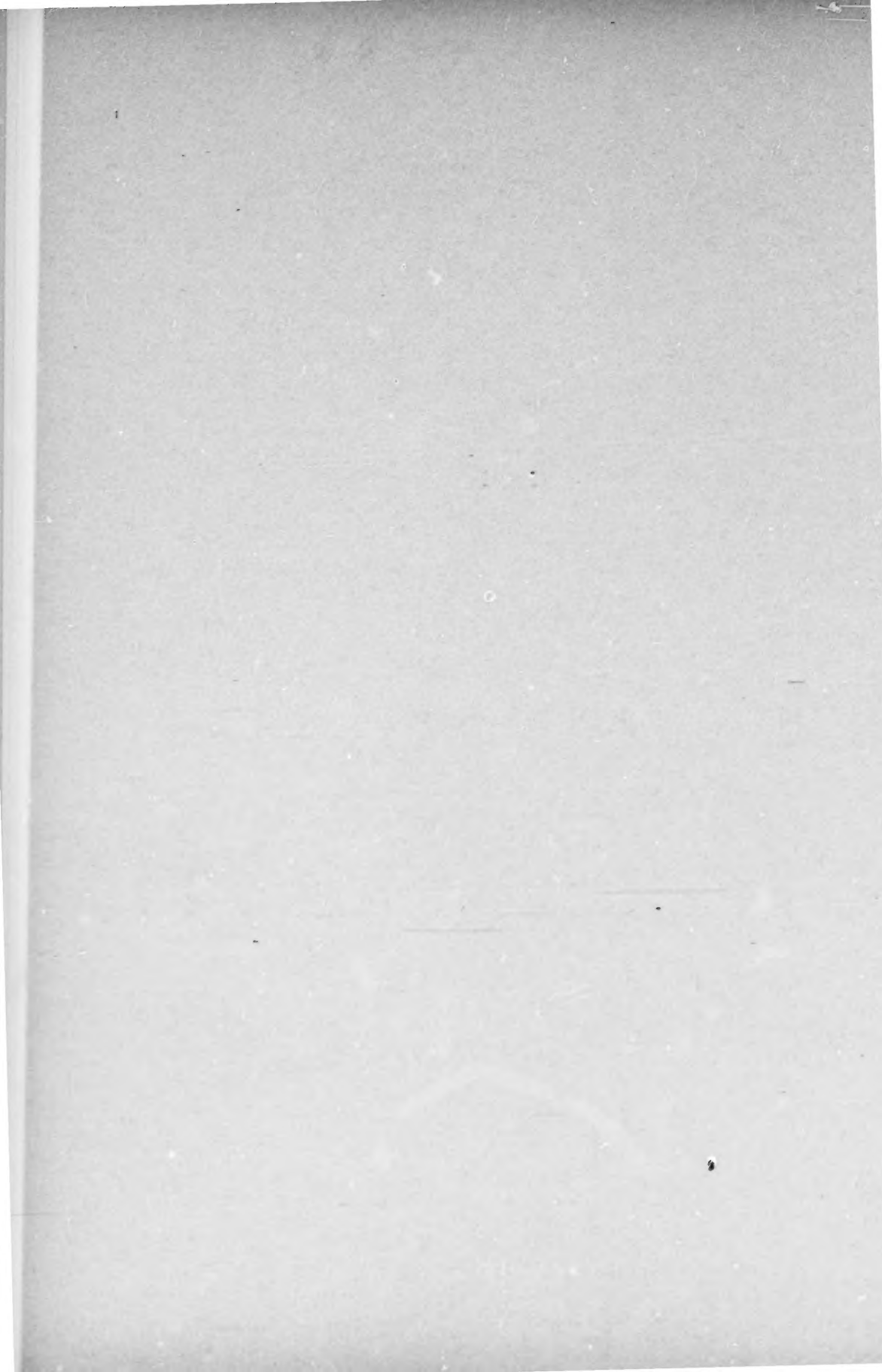


EXHIBIT A

The New York State Interfaith Commission on Landmarking of Religious Property (the "Interfaith Commission") is a multid denominational group organized in 1980 to assess the impact of landmark preservation laws on religious institutions. The Interfaith Commission's member organizations include the New York Board of Rabbis, the New York State Catholic Conference, the new York State Council of Churches, the Council of Churches of the City of New York and the Queens Federation of Churches.

The Council of Churches of the City of New York, Inc. is an ecumenical coalition of the major religious organizations representing twelve Protestant and Orthodox denominations with approximately 1,000 congregations in the City of New York. Founded in 1968, the Council continues the work of the former Protestant Council of the City of New York.

The Queens Federation of Churches was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 260 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry.

The New York State Council of Churches in an ecumenical organization whose members include thirty-seven Judicatories from the following Churches: African Methodist Episcopal Church; African Methodist Episcopal Church, Zion; American Baptist Churches; Christian Church (Disciples of Christ); Empire Baptist Convention; Episcopal Church; Evangelical Lutheran Church in America; Moravian Church in America; Three Orthodox Communions; Presbyterian Church, U.S.A.; Reformed Church in America; Religious Society of Friends; United Church of Christ; and The United Methodist Church. The Council has cooperative relationships with the Roman Catholic Church and Jewish Communities and collegial rela-

tionships with twenty-one staffed local metropolitan, ecumenical and inter-religious councils in New York State.

The National Council of Churches of Christ in the U.S.A. is a community of communions composed of thirty two religious bodies having over 40 million constituents in the United States. Its public positions are based on policies adopted by its Governing Board, composed of about 250 members selected by the member denominations in proportion to their size and support of the Council.

The National Association of Evangelicals is a nonprofit association of evangelical Christian organizations, colleges, and universities, as well some 50,000 churches from 74 denominations. The Association serves a constituency of 15 million people.

The Board of Rabbis, the largest Rabbinic organization in the world, with a membership comprised of Orthodox, Conservative and Reform Rabbis, is dedicated to social progress and religious freedom. The New York Board of Rabbis is a principal expositor of the views of the Rabbinate of the New York Metropolitan area as well as the Rabbinate of the State of New York.

The Christian Church (Disciples of Christ) is a Protestant denomination composed of 1.1 million members in 4200 congregations in the United States and Canada which conducts mission, ministry and service projects in many countries. The Division of Homeland Ministries is the unit within the Christian Church (Disciples of Christ) primarily responsible for developing church programs in the United States and Canada. The Department of Church in Society, with the Division of Homeland Ministries, is primarily responsible for education and action programs in areas of social justice. Those areas include the safeguarding of religious liberties and the relations between church and state.

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution. Americans United has approximately 50,000 individual members of various religious

beliefs, and some of no religious belief, plus 4,000 cooperating religious organizations in all states in the United States. Americans United is involved in extensive litigation of First Amendment Establishment Clause issues throughout the United States. Since 1947, it has been involved in a large portion of Establishment Clause cases coming before the Supreme Court, including such noteworthy cases as: *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); and *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985).

The Reformed Church in America, a continuation in the United States of the Dutch Reformed Church, ministers to a membership in excess of 400,000 people of different ethnic and racial backgrounds, located throughout the United States in almost 1,000 church communities.

James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods.

The General Assembly of the Presbyterian Church has not reviewed the content of this brief, nor does the amicus assert that the brief is harmonious in all its parts with the views and doctrines of the Presbyterian Church (U.S.A.). The brief is consistent with the policies adopted by the General Assembly regarding the Free Exercise Clause of the First Amendment and the landmark status of church property. The 200th General Assembly of the Presbyterian Church (U.S.A.) squarely addressed this issue in 1988:

Churches have a right of autonomy protected by the Free Exercise Clause of the First Amendment. Each worshipping community has the right to govern itself and order its life and activity free of government intervention.

. . . .

The government may not require a congregation to maintain a church structure because of its historical significance or subject it to proceedings in eminent domain in order to preserve a church structure. The church should make every effort to cooperate with efforts to preserve esthetic and architectural character but must finally itself by the judge of what religious life and mission require concerning property and its use.

God Alone Is Lord Of The Conscience, A Policy Statement Adopted by the General Assembly (1988) Presbyterian Church (U.S.A.), pp. 16-17.

The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.



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No. 90-900

Supreme Court, U.S.
FILED

FEB 1 1991

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE
VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioners,

vs.

THE CITY OF NEW YORK AND
THE LANDMARKS PRESERVATION COMMISSION
OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF OF THE CHURCH OF ST. PAUL AND ST.
ANDREW AS AMICUS CURIAE IN SUPPORT OF
PETITIONER'S PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

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INTRODUCTION

The Church of St. Paul and St. Andrew, 263 West End Avenue, New York, New York, submits this brief as *amicus curiae* in support of the application of petitioners The Rector, Wardens and Members of the Vestry of St. Bartholomew's Church, for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

INTEREST OF THE AMICUS

The Church of St. Paul and St. Andrew is a United Methodist church congregation located at the corner of West End Avenue and West 86th Street, Manhattan. Its church building was designated a landmark in 1981 over the strong objections of the congregation. Despite the severely deteriorated condition of that building and the Church's almost total lack of funds to renovate or merely maintain the building, the Landmarks Preservation Commission has strenuously, and so far successfully, opposed - in the New York courts and thereafter in a hardship proceeding before the Commission - the efforts of the Church to obtain permission to replace the decayed structure.

The Commission's opposition to the Church of St. Paul and St. Andrew reflects the Commission's policy that, regardless of the physical and financial hardship imposed on a religious institution by a landmarked structure, the structure is to be preserved at all costs.

The Church of St. Paul and St. Andrew is deeply concerned for itself and for all other churches and religious institutions at the conclusion of the court of appeals in the proceedings below that the Supreme Court decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) permits landmark regulation to "'freeze' a church's property in its existing use and prevent the Church from expanding or altering its activities . . ." *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990) at page 356. The Church of St. Paul and St. Andrew has been the victim of just such "freezing."

As this Court considers the petition for a writ of certiorari of *St. Bartholomew's Church*, we urge that the Court recognize that the confiscatory impact of the Landmarks Law on religious institutions is by no means limited to that particular church. The devastating experience of the Church of St. Paul and St. Andrew shows how that Law is unconstitutional as applied both to the Church of St. Paul and St. Andrew and to the petitioner herein.

SUMMARY OF ARGUMENT

The Church of St. Paul and St. Andrew occupies a large decaying building on the West side of Manhattan which dates back to 1897. The Church conducts an active program of religious worship and mission outreach, including programs for the hungry and homeless. All of these programs have been harmed and limited by the progressive deterioration of the structure, by growing safety problems, by major interior design deficiencies, and by the tremendous financial drain of just trying to maintain and operate the building. The Church has an endowment of less than \$100,000 and no means of renovating or restoring the building.

After much study the Church decided in 1980 that to survive as a religious congregation and carry out its mission and program it would have to demolish the structure and to put up a new building on the site, to provide safe, functional and economic facilities. The new structure was to include residential housing to fund the cost of construction and to help finance the operation of the new church facility.

The Landmarks Commission designated the existing structure a landmark in 1981 over the Church's strong objections that the designation would greatly harm the Church, was an unconstitutional taking and a substantial interference with the Church's religious programs. After costly litigation, the New York Court of Appeals held in a 4-3 decision that the Church's claim of an unconstitutional designation was premature and that the Church should first apply to the Commission for permission to rebuild, in a so-called "hardship" proceeding. *Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510, cert. denied, 479 U.S. 985 (1986).

In 1988 the Church filed a hardship proceeding with the Commission, and was strenuously opposed by two private agencies with close ties to the Commission: the Landmarks Conservancy and the Municipal Art Society. The Church's engineering study showed that more than \$8,000,000 were needed to make the existing structure safe and usable. A study by the New York

City Department of General Services essentially confirmed the Church's cost study by identifying total costs for repair and renovation of over \$6,000,000.

Although the proceeding showed the disastrous condition of the building and the Church's lack of financial resources, the Commission nevertheless denied the Church's hardship application by adopting the arguments of the Church's opponents, e.g., that the Church first ought to try to raise in the community the millions of dollars needed, or that the Church should try to earn money by renting out its worship facilities. The Church had already looked at all of those alternatives, and was left with absolutely no choice but demolition.

The Commission's hearing process, which denied any right of cross examination to the Church, was little more than an open town meeting, where the chief opponents presented fanciful alternatives to demolition. The Commission largely ignored the Church's extensive proof of the devastating impact of the condition of the building and the finances of the Church on the Church's religious and mission programs.

Since 1981, the financial costs to the Church of the Commission's hearings and hardship proceedings have totalled well over \$100,000, an enormous burden for an impoverished church. During those years the Church's building has further deteriorated, and emergency repairs alone have taken more funds from the Church's programs.

The effect of the Commission's actions has been to drain away the time, energy and minuscule funds of the Church of St. Paul and St. Andrew and to freeze the Church into its present structure and level of activities, thereby severely impairing its ability to carry out its religious purposes and its programs for the hungry and the homeless, and indeed threatening its continued existence. The Commission has effectively taken the bulk of the value of the Church's property (its only significant asset) for the Commission's purposes.

With its single goal of preserving the Church's building at all costs, the Commission has involved itself in the decision-making process of the Church of St. Paul and St. Andrew as to its programs and finances, thereby taking control of its property and becoming firmly entangled in its religious affairs. That same policy, implemented in the name of the Landmarks Law, has been applied in the present case against petitioner St. Bartholomew's Church.

The Church of St. Paul and St. Andrew is at the crossroads in determining its future. The Church *must* change. As stated above, it can not continue in its building as is, because of the safety hazards and tremendous costs. In essence, there are two courses of action open to it: (1) a new building allowing the Church both to survive and continue as a religious congregation with facilities and funds necessary to carry out its mission and community programs, or (2) a congregation forced to expend its time, energies, and funds to renovate, restore, maintain, and operate this landmarked building. The Church of St. Paul and St. Andrew is a Methodist Church congregation whose purposes are clearly stated in course #1 above. The effect of the Landmarks Commission's actions (as discussed in the Argument below) has been to force the Church to adopt course #2 above and thereby to change its religious purposes and programs. This is clearly an interference with its religious life and a coercion to adopt new religious priorities and practices.

The same result has been accomplished by the Commission with respect to the petitioner herein. We urge that the petition be granted.

ARGUMENT

Background.

The church building of the Church of St. Paul and St. Andrew, constructed in 1897, includes its sanctuary for worship and its parish house, at the northeast corner of West End Avenue and 86th Street, Manhattan. The congregation was founded in 1834, and the present structure is its third building.

As a congregation of the United Methodist Church, its purposes are to carry out a broad mission of religious worship and social ministry. In fulfilling that mission, the Church conducts within the building an extensive program of religious services as well as mission activities which include the Nutrition and Health Center, the West Side Campaign Against Hunger, the United Methodist Women program, young adult programs, bible study programs. This Church is well known as being in the forefront of those institutions which provide extensive human services to the community. For example, the two large feeding programs mentioned above together produce 6000 meals per week (or a total of 300,000 meals per year) for senior citizens, the homeless and shut-ins, which are delivered all over the City by a fleet of five trucks. In addition the Church runs a shelter for the homeless as well as extensive programs for young people and college students designed to provide an alternative to the crime and drugs all about them.

The interior design of the church building includes an enormous sanctuary and a huge concert hall, which, together, take up a disproportionate share of the church (80% of the total volume of program space). The building design reflected the needs of the Church when it was built in 1897. It does not meet the needs and purposes of this Church in the 1970s, 1980s or 1990s. There is little space for offices, meeting rooms, mission outreach program space, etc., all of which are acutely needed for the Church's programs and mission. There are no fire safety sprinkler systems or fire enclosed stairways. Portions of the building can no longer be used because of safety problems.

Over the years the church building had severely deteriorated, mainly because the building's limestone and terra cotta construction is highly susceptible to water damage. In the 1960s — long before the New York City Landmarks Preservation Commission showed any interest in the Church of St. Paul and St. Andrew — the Church began to consider the demolition of the current building and construction of a new building with adequate facilities as major repair needs grew far more urgent and costly. The roof and exterior walls and decorations in particular began to show signs of severe deterioration, presenting significant hazards to members and pedestrians.

The Church has a membership of about 200 and is a vital congregation which is slowly growing in numbers. The Church has never had a large endowment, and, accordingly, funds for renovations were generally raised by direct appeals to the congregation. In a campaign from 1967 to 1971 the Church raised about \$75,000, virtually all of which was paid out for repairs to the exterior and roof.

Despite these efforts, the deterioration of the church building accelerated. The Church simply could not generate the funds needed to cover the huge costs of renovation and repairs. With the escalating heating costs of its huge, inefficient interior open spaces, the Church also generally ran an operating deficit.

Decision to demolish.

By 1980 — again, before the Landmarks Preservation Commission evidenced any interest in the Church's building — the Church had decided to demolish the church building and construct a new building. The new building would include new, modern and safe facilities which the Church presently lacks — (1) adequate program and meeting rooms; (2) a fire safety sprinkler system and fire enclosed stairways as required in the New York City building codes for buildings built today; (3) an elevator for the children, the elderly and the handicapped, etc.; (4) kitchen and lavatory facilities; (5) handicap facilities; and (6) a smaller sanctuary. It could also include residential

housing units which would provide the funds necessary for the construction of its new building and which could also provide operating income for the Church and its programs.

Local residents around the Church learned of the Church's decision to demolish, and a Preservationist movement was mounted to persuade the Landmarks Preservation Commission to stop the demolition by designating the church building a landmark. The Church strenuously objected to the proposed designation, but over those objections the Commission designated the church building a landmark on November 24, 1981, completely ignoring the physical and financial problems which the designation would produce. The Commission claimed it could not examine this data until the "hardship proceeding."

The Church's lawsuit.

Promptly following the landmark designation the Church brought suit against the Commission in the New York State Supreme Court, New York County. The suit was brought on the ground that because of (a) the severely deteriorated condition of the building, (b) the threat to safety, (c) the total lack of financial resources of the Church to repair and renovate the building as required, and (d) the lack of adequate facilities for its worship and programs, the landmark designation impeded the work of the Church and was therefore unconstitutional since it substantially interfered, physically and financially, with the ability of the Church to carry out its religious programs. The Commission opposed the suit, not on the ground that the Church lacked a "hardship," but rather on the ground that the "hardship" should first be processed by the Commission in its own administrative "hardship proceeding."

The litigation was finally decided against the Church by the New York Court of Appeals by a 4-3 court (*Church of St. Paul and St. Andrew v. Barwick*, 67 N.Y.2d 510 (1986) on the basis that the case would not be "ripe" until the Church brought a "hardship" proceeding before the Commission and gave the Commission an opportunity to examine the financial and physical hardship of the Church in that proceeding, since the

court erroneously asserted the Church was simply renovating its building, not re-building anew. The lengthy dissenting opinion, however, argued that saving a small piece of the Church was not "renovation," and that the Church's uncontested financial and physical hardship meant the landmark designation was unconstitutional as applied. The Church filed a petition for certiorari with the U.S. Supreme Court, which was denied. *Cert. denied*, 479 U.S. 985 (1986). That litigation occupied almost five years and, despite help from other Methodist congregations, it cost the Church approximately \$35,000 in legal fees, further reducing the Church's small endowment to less than \$100,000.

After the litigation was over, the Church looked again at its options, in light of its purposes and programs as a religious congregation, its safety problems, the advancing deterioration and enormous renovation and operational costs of its building, and its almost total lack of funds. Its membership strongly reaffirmed the decision to demolish and rebuild in order to carry out its mission. The Church confirmed with real estate consultants that although it had no significant funds, the value of its land would easily support the financing necessary for the demolition of the existing building and construction of a new building, whether the work was done by a developer or directly by the Church acting as its own builder. Hence, the Church's plan to demolish and rebuild was wholly feasible.

The Church's hardship proceeding.

Although the Church had made a final decision to demolish and rebuild, its ability to complete the planning for its new building was severely hampered because of uncertainty as to whether the Commission would confirm the Church's hardship and grant the Church a permit to demolish. Architectural and consultants' fees for plans, advice and information represented significant and difficult costs for this congregation with virtually no funds and no guarantee of being able to go forward, even after spending those sums.

Since the Church's hardship was manifest — in light of its huge repair and renovation costs and its lack of funds — the Church determined that the proper sequence of steps would be first to file the hardship proceeding with the Commission and establish its "hardship" under the Landmarks Law in order to be free to complete the arrangements for demolition and construction. The Church was following the judicial hardship test established by the New York courts in *Matter of Trustees of Sailors' Snug Harbor v. Platt*, 29 AD2d 376 (1968), and confirmed by *Lutheran Church v. City of New York*, 35 NY2d 121 (1974), and *Matter of Society for Ethical Culture v. Spatt*, 51 NY2d 449 (1980), by showing that the maintenance of the building substantially interfered, physically and financially, with the religious purposes and programs of this Church. As shown in *Sailors' Snug Harbor, supra.*, that test was to be applied in light of the purposes and resources of the Church.

Hence, in November 1988 the Church filed a hardship proceeding before the Commission, asking for a determination that a financial and physical hardship existed and requesting a permit to demolish. The Church presented an application of well over 100 pages, including an architectural/engineering report showing that the cost of repairs and renovations needed to preserve the existing building and make it usable would total over \$8,000,000. The Church had only approximately \$100,000. The application also included detailed photographs of the exterior and interior of the church building, with graphic illustrations of the deterioration and deficiencies of the building (including safety problems), and also carefully showed the myriad ways in which the deficiencies of the building impaired the programs of the Church.

During the course of the hardship proceeding the Commission itself asked the New York City Department of General Services to inspect the building and evaluate the Church's claims as to repair and renovation costs. The Department of General Services essentially confirmed the enormity of those costs, identifying total projected costs of over \$6,000,000, which the DGS report concluded could be expended in three phased periods and would cover, first, the most urgent costs, second, additional costs

which could be briefly deferred, and third, costs of the building improvements needed to meet the Church's program requirements. When contingency and financing costs omitted by the DGS report are factored into the DGS estimates of total repair and renovation costs, the total costs calculated by the DGS report and by the Church's own architectural/engineering study are close. And even if the costs were only \$6,000,000 rather than \$8,000,000 the Church still had only \$100,000.

Nevertheless, the Commission found *against* the Church in the hardship proceeding, on the ground that regardless of the physical condition of the building or the financial condition of the Church, the Church had not shown that it had exhausted all alternatives short of demolition. This was based on testimony by preservationist groups, who urged that those alternatives might have included the following: renting space to various profit making and non-profit enterprises to raise money, embarking on a massive multi-year fund raising campaign aimed at raising the millions of dollars needed for the renovation, or demolishing only part of the building and constructing a new building around the saved structure.

In fact, those very alternatives had been explored by the Church, as shown in the massive documentation and testimony before the Commission. In addition, it is obvious that the adoption of these alternatives would force the Church to cancel its own programs, spend all of its time and energy on a dubious fund-raising program, and forfeit the value of its property in order to save part of the building.

The Commission also concluded that it could not evaluate the hardship imposed on the Church by the physical condition of the existing building until the Church submitted to the Commission detailed studies of the program facilities which would be provided the Church in the new building, apparently to see if these facilities could instead be fitted into the present building. This remarkable conclusion evidently assumed that the Church has the option of staying in its current building and repairing and renovating it, even though the Church has virtually no funds. Furthermore, as stated before and as the Church showed

in the hardship proceeding, the very reason the proceeding was brought at that time was that the Church lacked the funds needed to complete its detailed plans for the new building and that the uncertainty of the Church's right to demolish under the Landmarks Law significantly interfered with the Church's ability to complete that planning process. The congregation knew it could not afford to spend more of its meager funds until it learned whether it could go forward.

The Commission in fact has tried to substitute its own purpose of architectural preservation for the religious purposes for which these funds were originally given by the donors and to which the congregation is seeking to apply them. The Commission has taken this property for its own purposes.

The Commission's hearing process.

The Commission's 66 page determination attempts to give the impression that some form of judicial due process had been followed, leading to a careful evaluation of the evidence offered with a final decision by a neutral party. Such a process would have given the standard protections to the parties involved, particularly the applicant. Nothing could be further from the truth.

In fact, the hearings consisted simply of the Commission's gathering of statements, both documentary and testimonial. The Church's opponents were allowed to submit any testimony on any subject; none of the testimony was sworn; and in many cases the person submitting the testimony or statement was not even present. The Commission denied to the Church any right of cross-examination and allowed into the "record" any statement, oral or written, without regard to relevancy or truthfulness or evidentiary basis whatsoever. As a result, the "record" of materials in opposition to the Church's application is not a record in any judicial or even administrative sense but is merely an aggregation of letters, statements, studies, memoranda, and other materials (many of which are untrue and have no factual basis) submitted by the Municipal Art Society, the Landmarks Conservancy, and other preservationist organizations and their supporters. Those unsupported statements were then generously paraphrased or summarized by the Commission in creating the

so-called record of the proceedings incorporated into the Commission's formal determination. Yet this so-called record could never be a reliable basis either for a court determination or for an administrative determination which could be sustained on court review.

For example, opposing witnesses simply asserted that the Church could relieve its lack of funds by going out and raising money or selling its air rights. The witnesses provided no basis for these assertions other than vague speculation. With no cross examination permitted, that untested material is reported in the Commission's determination as though it was "evidence" supporting the Commission's determination.

That speculation and opinion was then used by the Commission in its final determination. For example, the determination stated the Commission had "been informed" of the Church's "refusal to explore community offers to raise significant funding on behalf of the Church." During the hearing witnesses speculated that the community might be able to raise funds for the Church, even though the Church had no money to rebuild. The Church was not allowed to cross examine those witnesses, and the claim that the community could raise anywhere near the funds needed by the Church never rose beyond the level of sheer wishful thinking.

Similarly, the determination asserts that the Commission "had been informed" of the Church's "refusal to consider proposals for development that would require only partial demolition." By denying the Church the right of cross examination, the Commission again barred the Church from revealing that the witnesses who alluded to the possibility of partial demolition were again simply speculating or acting in their own financial interests to the detriment of the Church. One proposal discussed at length in the determination would have had the effect of taking 85% of the value of its property away from the Church.

Since the Commission grants full latitude to witnesses regarding the quality, character and source of evidence asserted — i.e., hearsay, even opinion and speculation is permitted — the right

of cross examination becomes a vital part of the process. Without cross examination, the Commission has no basis whatever on which to evaluate the evidence. The need for cross examination is underlined when one realizes that many of the witnesses were from preservationist groups whose goal, we submit, was — as was the Commission's — to preserve the Church's building rather than to deal with the needs and purposes of the Church.

The Commission's absence of neutrality.

The Landmarks Preservation Commission's stated goal is to preserve buildings. Nevertheless in a "hardship" proceeding deeply affecting the life of a church and the multitude of people which this Church serves through its programs, surely the Church was entitled to have the judge of the facts — i.e, the Commission — manifest neutrality and a fair balancing of interests. In reality the Commission was anything but neutral. Instead it functioned as the strong advocate of preservation at the same time it was performing the formal role of judge and jury in the hardship proceeding. Under the Landmarks Law, the question of "hardship" concerned this Church and its own needs and purposes. The hardship proceeding, however, turned into nothing more than a town meeting chaired by the Commission and devoted to the question of how to "save" the Church's building regardless of whether the Church could maintain or function in the building, and the Church was pejoratively labeled by Commissioners and their supporters a "developer." As one Commissioner stated in the hardship hearing: "I suppose we could say it is the Developmentalist versus the Preservationist."

There was absolutely no interest on the part of the Commission and the preservationists as to how the Church's building interfered with the purposes and programs of the Church. They virtually ignored the massive amount of the Church's testimony and that of its supporters as to the damage being done to the Church's religious life and programs for the poor, the homeless, etc. There was indeed no balancing of interests whatsoever. The Commission demonstrated constant concern with only the building as though it were the most important aspect of the Church and the Church, accordingly, had to justify any change

in the building whatsoever. There was never any consideration of the Church's purposes and no recognition by the Commission of its burden of justifying interference with those purposes.

The Commission, throughout the proceedings, attempted to present itself as the neutral judge, with the "public" on one side, the Church on the other side, the Commission merely attempting to judge between them. In fact, the opponents were not the general public but were primarily avowed preservationist groups with close ties to the Commission. As the Church showed at the hearings, there was great support for the Church among the general public, which included the religious community and the large numbers of people the Church serves through its programs.

The Church's hardship.

Only the most tortured reasoning permits the conclusion that the Church did not prove its hardship. Indeed, as noted above, the New York City Department of General Services found approximately \$6,000,000 in needed renovation costs, and the Church had only \$100,000. Those plain facts constitute the hardship.

Effect on the Church of the Commission's actions.

By insisting on landmarking the Church's decayed building, by opposing the Church's efforts in the courts to have the landmark designation lifted, and by ignoring the Church's proof of hardship in the recently completed hardship proceeding, the Commission has frozen the Church into its present building, controlling the Church's mission by effectively forcing the Church to spend its funds and resources to keep up the decayed structure. The Commission has thereby substantially interfered with the Church's carrying out its religious and social programs and purposes for which it was created.

Central to the decision by the court of appeals in the proceedings herein below was the proposition that landmarks regulation is acceptable so long as it does not interfere with the *historical* use of the property. The court of appeals indicated

that the Landmarks Law may "freeze" a church's property and usage so long as the church can continue its present activities. *St. Bartholomew's Church v. City of New York*, 914 F.2d at 356. The Landmarks Preservation Commission has consistently followed this thinking in its dealings with the Church of St. Paul and St. Andrew.

One must look at the history of Church of St. Paul and St. Andrew to see what this "freezing" principle means to it. This has been a church devoted to mission and service to its congregation and to the needy of the community about it. Whenever those needs have changed, the Church of St. Paul and St. Andrew has changed. This is, in fact, the third building that this congregation has occupied. The irony is that if the Landmarks Law had been in effect a long time ago, this congregation might well have been frozen into a different and smaller building and the current building would never have come into being. The massive programs that are being carried on by this Church for the hungry, the destitute and the homeless might likewise never have come into being. The Church would have been frozen into the outdated usage of an older building and an outdated ministry. Churches have always been able to express their faith through their works. To freeze churches into doing only what they have done in the past completely blocks their new expressions of that faith.

One must look at the role of the churches and synagogues in our cities today. They are among the key providers of help to the needy. This is a main part of their religion. The decision of the court of appeals below states "No one seriously contends that the Landmarks Law interferes with substantive religious views." 914 F.2d at 354. In forcing the Church of St. Paul and St. Andrew and others in the religious community to abandon those programs which they believe they are called by their faith to do, the Landmarks Law is, in fact, dictating a new religious basis to them. The change of buildings for the Church of St. Paul and St. Andrew is not only an expression of its religious faith but the direct continuation of it. The decision of the court of appeals below states that Supreme Court decisions indicate that "government may not coerce an individual to adopt a certain belief . . ." 914 F.2d at 354. Forcing the Church of

St. Paul and St. Andrew and others in the religious community to change their purposes and, instead, expend their time, energies and funds on fundraising and caring for buildings to the detriment of what they feel called upon to do with those resources, is indeed forcing them to adopt a belief in practice if not in fact.

The decision below also states: "The central question in identifying an unconstitutional burden is whether the claimant has been denied the practice of his religion or coerced in the nature of those practices." 914 F.2d at 355. To force the Church of St. Paul and St. Andrew to adopt the purposes of architectural preservation against its will and belief is certainly coercing it. To force that Church to take all of the value of its property and commit it instead to architectural preservation and ignore the massive needs of the society around it is forcing that Church to act contrary to its religious beliefs.

The *Penn Central* decision, *supra.*, discusses percentage of profits and a reasonable return on landmarked property. But the Church of St. Paul and St. Andrew is not a commercial venture seeking profits and a reasonable monetary return. Ironically, that is exactly what the preservationists would have this Church become. They have consistently urged the Church to make money by renting out its space to theaters, artists, branch libraries, discotheques, doctors, accountants, etc. This would, of course, displace and terminate all of the Church's programs for its congregation and the needy whom it serves. It should be noted that rentals, profits, and reasonable monetary returns have never been a part of the "historic use" of this property.

For the Church of St. Paul and St. Andrew, the "return" on the Church's property rests on how much the Church can do for its congregation and the many people that it helps. Funds have been given to this Church through the decades for the good works that it does for others. This is the "historic use" of this Church's property and resources, not the maintenance of a building. To deprive this Church of its resources to help others is to take the value of its property for the purposes of others. In the case of the Church of St. Paul and St. Andrew, this

property holds out the possibility of enlarged feeding programs, shelters for the homeless, affordable housing, drug rehabilitation and education programs, AIDS programs, and countless other programs that this Church has been wanting to do for well over a decade and has been prevented from doing by the preservationists.

Had this Church not been landmarked, it could have brought in substantial funds over the last decade for its religious purposes and mission. To say that all this Church will ever have the right to do is just what it was doing in 1980 is to take away all of those programs and possibilities. This, in fact robs the Church of the bulk of the value of its property and thereby most of the possibilities for carrying out its faith and mission. Those elements are inextricably bound together.

The Church of St. Paul and St. Andrew is now left with the choice of going to court again (with virtually no funds to finance that effort), or re-applying to the Commission with a new application, including all of the legal and professional fees necessary. The prior hardship proceeding covered almost six months (November 1988 - May 1989). There were three public hearings, and five additional Commission meetings dealing with the Church's application. Legal and architectural fees for the Church amounted to approximately \$75,000 — a tremendous "hardship" for a virtually destitute religious institution. In addition, the Commission has yet to tell the Church what is acceptable to the Commission or to provide clear procedures or guidelines, leaving the prospect that the Church could be turned down on repeated applications. There is every expectation that the opponents will similarly do everything possible to block any new application by the Church, to prolong the proceeding, and to escalate the costs and thereby deplete the Church's resources and determination, forcing it to give up the fight and take whatever the Commission will allow. The Church obviously faces vast additional expense in further proceedings before the Commission and very possibly in the courts.

Entanglement.

In examining this Church's landmark proceedings it becomes clear that the purpose of the Commission was to get into the decision-making process of the Church of St. Paul and St. Andrew in order to compel the Church to devote its resources to the maintenance of its building "for the public good." As one Commissioner stated in the hardship hearings of this Church, "We see landmarks as a public good." The Commission did not consider the Church's hardship but focused solely on preserving the building. It now requires the Church to spend considerably more money in preparing plans for its new facilities and returning to the Commission with a new application. The Commission says it will then perform a programmatic evaluation of those new facilities. It has also suggested that the Church carry out studies on fund raising for the millions of dollars needed, all of which only add more time and expense for the Church.

That insistence on programmatic evaluation deeply and profoundly entangles the Commission in the religious purposes and programs of the Church. By conditioning its permit to demolish on its determination as to the need and arrangement of the Church's programmatic facilities, the Commission effectively exercises control over what those facilities will be.

Similarly, by requiring that the Church first commit itself to a massive, multi-year, multi-million dollar fund-raising program before the Commission will acknowledge that the Church's lack of funds is a major factor in its hardship, the Commission is seeking to determine how the time, energies and resources of the congregation will be spent. By insisting that the Church consider renting out substantial parts of its space or selling its air rights (for which there are no known buyers), the Commission is seeking to control the Church's finances and force funds to be used for the Commission's purposes.

The Commission's control of the Church has now become far more pervasive with the Commission's rejection of the Church's hardship application and with the conditions imposed in that rejection. The Commission has deepened its entanglement in the Church's religious purposes, programs and finances.

CONCLUSION

The experience of the Church of St. Paul and St. Andrew at the hands of the Commission reflects a policy of the Commission that a religious institution and its mission may be "frozen" into a landmarked structure in order to preserve the structure regardless of the detrimental impact on the religious institution. The Commission has substantially interfered with the Church of St. Paul and St. Andrew's carrying out its religious and mission programs and purposes for which it was created and has sought to substitute other purposes. The Commission has taken this Church's property for its own purposes of architectural preservation. In so doing, it has become entangled in the religious purposes and programs of the Church of St. Paul and St. Andrew.

It is submitted that this unyielding preservation policy has been similarly applied to St. Bartholomew's Church, the petitioner herein, with the same results.

For these reasons, the Church of St. Paul and St. Andrew urges that the petition for certiorari be granted.

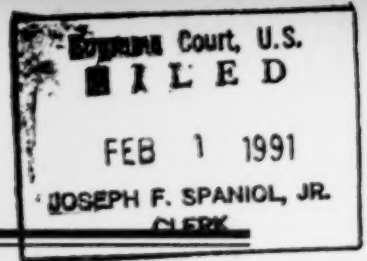
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(6)
No. 90-900



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

THE RECTOR, WARDENS AND MEMBERS OF THE
VESTRY OF ST. BARTHOLOMEW'S CHURCH, *Petitioner,*

v.

THE CITY OF NEW YORK AND THE LANDMARKS
PRESERVATION COMMISSION OF THE CITY OF NEW YORK
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Second Circuit

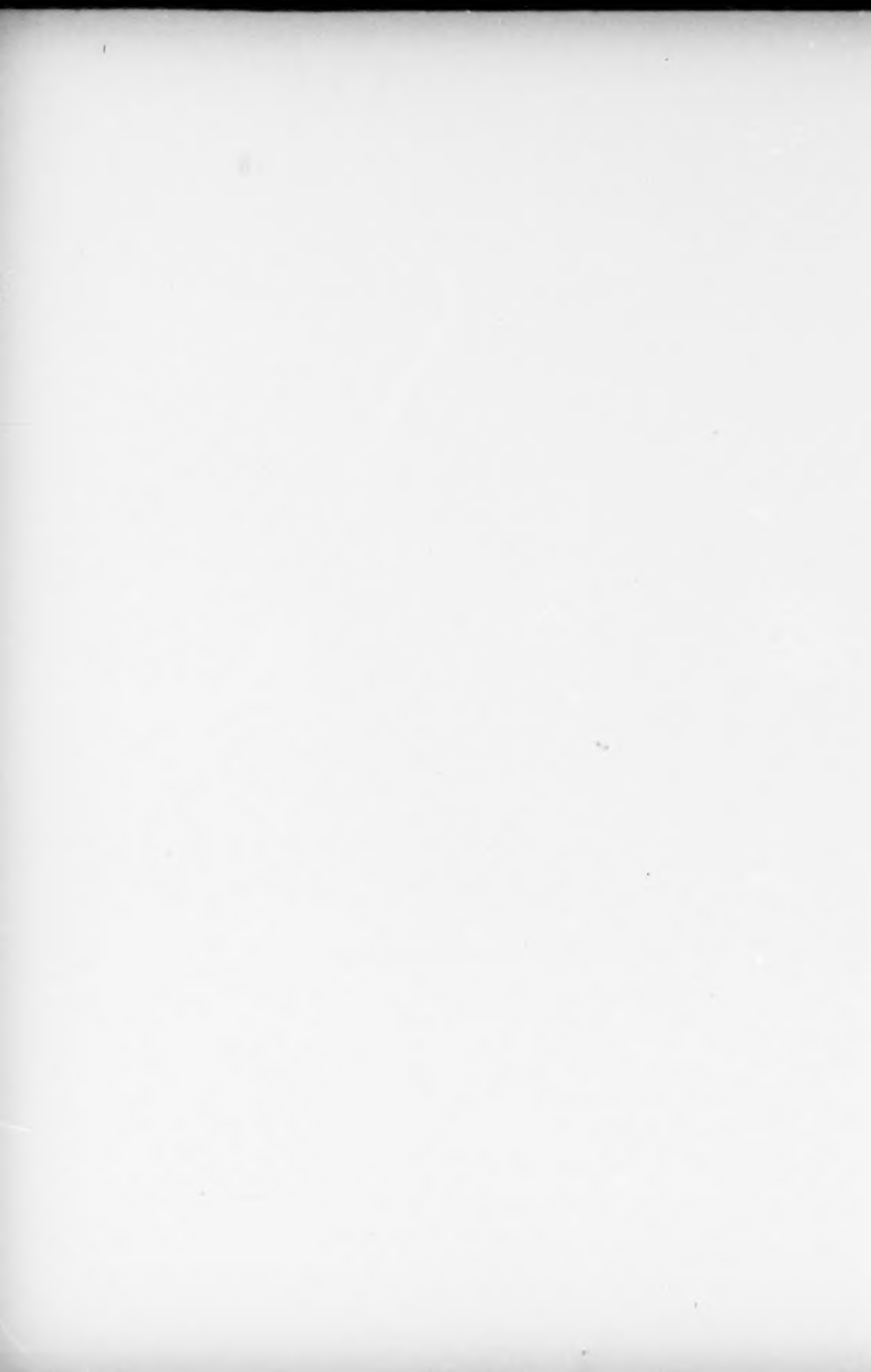
**BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

1. Whether the Establishment Clause of the First Amendment to the United States Constitution has been violated by the New York Landmarks Law because the religious practices of St. Bartholomew's Church has been substantially inhibited and the law has caused the City and the courts to become entangled in religious affairs.

2. Whether the Free Exercise Clause of the First Amendment to the United States Constitution has likewise been violated by the New York Landmarks Law, in spite of *Employment Division, Dep't of Human Resources of Oregon v. Smith*, ___ U.S. ___, 110 S. Ct. 1595 (1990), *rehearing denied*, 110 S. Ct. 2605 (1990), because of the governmental burden which the law has placed on the legitimate actions of the Church.

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IN THE
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OCTOBER TERM, 1990

No. 90-900

THE RECTOR, WARDENS AND MEMBERS OF THE
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v.

THE CITY OF NEW YORK AND THE LANDMARKS
PRESERVATION COMMISSION OF THE CITY OF NEW YORK,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Second Circuit

**BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

STATEMENT OF INTEREST

The Council on Religious Freedom is a national nonprofit corporation which was formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include protection of churches and other religious organizations from government intrusion into their internal affairs.

Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, and who recognize the importance of preserving and promoting the constitutional principles of the free exercise

of religion and opposing any encroachment by private or governmental agencies which limit or tend to inhibit the free exercise of religion.

The Council on Religious Freedom is concerned with the growing trend of state landmarks laws which designate church buildings as landmark sites and thereafter attempt to control the church's internal affairs, including the way in which the church utilizes its sacred property, and encroach upon the authority of the church in determining how it will expend its funds for its religious mission.

This case, amicus believes, represents a prime example not only of the intrusion of a governmental agency into religious affairs but also the resultant involvement of the judiciary in matters that must, under the First Amendment, be left to the decision-making authority of the church.

Both petitioner and respondents, through their respective counsel of record, have consented to the filing of this brief, and said letters of consent accompany the filing of this brief.

SUMMARY OF ARGUMENT

The New York Landmarks Law violates the Establishment Clause of the First Amendment by both substantially inhibiting religion and creating excessive entanglement between church and state. The Establishment Clause is violated in this case because the Landmarks Law directly inhibits the Church in carrying out its religious mission and requires civil authorities (both administrative and judicial) to involve themselves in intimate church administrative matters.

In this case the trial court substituted its judgment for the judgment of the church vestry in determining whether St. Bartholomew's Church must continue to carry out its religious mission in its own cramped existing facilities. The district court, and subsequently the court of appeals, held that it is the

Church's burden to prove that it can no longer carry out its work in its present facilities before being permitted by the City to alter its church building located on its own land in a neighborhood consisting of skyscrapers and commercial establishments because of the City's interest in preserving historical landmarks.

The trial court below rejected the Church's claim that the Landmarks Law, as applied to St. Bartholomew's Church, resulted in excessive entanglement because the court believed that the excessive entanglement doctrine only applied to programs in which state aid to religious institutions requires extensive and continuous monitoring of church activities.

The court of appeals, although acknowledging that the entanglement clause doctrine was too narrowly applied by the district court, concluded that the factual situation in this case was akin to the facts in *Jimmy Swaggart Ministries v. Board of Equalization*, ___ U.S. ___, 110 S. Ct. 688 (1990). An examination of the law and its application disproves this mistaken conclusion. Unlike the *Swaggart* case where the claimed entanglement related basically to tax accounting, the New York Landmarks Law gives to a public agency, and ultimately the courts, power to determine whether a church must continue to carry out its religious mission in its own existing facilities. The New York Landmarks Law also empowers an administrative agency, and ultimately the courts, to determine whether the cost of repair and rehabilitation of a church facility is beyond the means of the church. The court of appeals, therefore, was clearly in error in equating the New York Landmarks Law with the decision of this Court in *Swaggart*.

The requirements of the Landmarks Law, in fact, guarantee the type of entangling contact which this Court has previously struck down in such cases as *New York v. Cathedral*

Academy, 434 U.S. 125 (1977). It also improperly places the burden upon the church to establish in a fact-finding hearing that the church cannot carry out its religious mission in its existing facilities.

It is not the function of government to determine how church funds dedicated to a religious ministry should be spent, and the constitutional problem is exacerbated by requiring a church to prove and quantify the extent of hardship it would suffer in order to utilize its funds in the way demanded by the state with the resultant inquiry by a city commission, and ultimately by the courts, into the specific details of church income and spending. Since government is prohibited from contributing tax funds to a church, it is equally constitutionally repugnant for any arm of the state to dictate how the church's treasury will be utilized by the church in carrying out its religious mission.

The Landmarks Law also violates the free exercise guarantees of the First Amendment. The court of appeals rigidly applied the recent holding of this Court in *Employment Division, Dep't of Human Resources of Oregon v. Smith*, ___ U.S. ___, 110 S. Ct. 1595 (1990), *rehearing denied*, 110 S. Ct. 2605 (1990), ignoring the fact that this case did not involve socially harmful conduct, and the Landmarks Law is not an across-the-board criminal prohibition on a particular form of conduct.

This case also falls within the "hybrid situation" noted in *Smith* since, in addition to the free exercise claim of the Church, other First Amendment rights are implicated, including the rights of assembly and association. In addition, the Taking Clause of the Fifth Amendment is also directly involved.

Finally, *Smith* should not apply because the New York Landmarks Law is a law that lends itself to individualized

governmental assessment as to the reasons for the relevant conduct. Thus, the utilization of the free exercise test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), is appropriate.

This amicus suggests that the *Smith* decision utilized by the court of appeals in this case does not invalidate the "no alternative means" requirement articulated in the free exercise test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and the courts below, as well as the administrative agency, apparently gave no consideration as to whether there were alternative means by which the City could have accomplished its aesthetic purposes without excessive entanglement between church and state. If the no alternative means analysis previously utilized by this Court in free exercise cases is still relevant, a Landmarks Law must require the City—not the church—to prove that there are no alternative means by which the City may accomplish its objectives.

ARGUMENT

I. THE LANDMARKS LAW ON ITS FACE, AND AS IMPLEMENTED AND APPLIED, VIOLATES THE ESTABLISHMENT CLAUSE BY INHIBITING RELIGION AND CREATING EXCESSIVE ENTANGLEMENT BETWEEN CHURCH AND STATE.

The opinions of the lower courts in this case indicate an absolute insensitivity toward the role of civil authority vis-a-vis a church. They not only demonstrate how the New York Landmarks Law violates the Establishment Clause of the First Amendment to the United States Constitution but also embroil the judicial branch of government into matters strictly set apart from civil cognizance by the First Amendment.

The court of appeals observed that "the Church contends that by denying its application to erect a commercial office tower on its property, the City of New York and the Landmarks Commission (collectively "the City") have impaired the

Church's ability to carry on and expand the ministerial and charitable activities that are central to its religious mission." *The Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. The City of New York, et al.*, 914 F.2d 348, 353 (2d Cir. 1990).

The court of appeals, in discussing the findings of the district court, noted that the district court was unconvinced concerning the Church's claims that "the Community House is an inadequate facility in which to carry out the various activities that presently comprise the Church's religious mission and charitable purpose." *Id.* at 357. The court of appeals stated that the district court "found that the Church failed to prove that the Community House is fundamentally unsuitable for its current use and that the cost of repair and rehabilitation is beyond the financial means of the Church." *Id.*

The trial court in effect acted in the place of the church vestry in determining how the Church should expend its funds. This was attempted by the district court even after acknowledging that "[p]laintiffs claim of unconstitutionality as applied depends upon plaintiffs ability to prove that it can no longer carry out its religious mission and charitable purpose in its existing facilities because those facilities are inadequate and because it cannot afford to expend the sums necessary to make these facilities adequate." *The Rector, Warden and Members of the Vestry of St. Bartholomew's Church v. City of New York, et al.*, 728 F. Supp. 958, 966 (S.D. N.Y. 1989). The district court stated in its opinion that "[a]ssuming arguendo that plaintiff's charitable work is the exercise of religion for First Amendment purposes, plaintiff must prove that it can no longer carry out this work in its existing facilities to sustain its free exercise claim." *Id.* (emphasis supplied). It is difficult to imagine a much more flagrant intrusion by the judicial branch of civil government into church administrative affairs.

This amicus contends that the action of the trial court and the inquiry permitted by the New York Landmarks Law, to which the court lent its authority, violates the Establishment Clause of the First Amendment to the United States Constitution in two ways. First, it very directly inhibits the church in carrying out its religious mission as its vestry deems best; and second, it thrusts civil authorities (both administrative and judicial) directly into church administrative matters, thus creating excessive entanglement between church and state.

As this Court has stated, "[e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from [the] cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

In *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 784 n.39 (1973), this Court stated:

Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.

When interpreting a law in light of the Establishment Clause, courts must not stop their examination even if they find the first, or even a major, effect of an enactment is for secular purposes. Instead, they must look for other direct and immediate effects. Although the effects test is normally couched in terms of the advancement of religion, this Court has always stated that government may also not use its power to inhibit religion.

This Court has also in numerous decisions recognized that civil courts have absolutely no authority to determine any matters of church government, faith, or doctrine. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

The trial court, in discussing the Church's position that the New York Landmarks Law has created excessive entanglement between church and state, erroneously concluded that the excessive entanglement "doctrine has normally been applied in factual situations in which state aid to religious institutions requires extensive and continuous monitoring of church activities to ensure that government financing is being used solely for secular purposes" and is not applicable "where, as here, the government must make an inquiry into church finances for the limited purpose of determining the validity of the church's claim of financial hardship." *St. Bartholomew's Church*, 728 F. Supp. at 963.

The court of appeals gave scant attention to the entanglement issue commenting only in the court's footnotes that "[t]he Church also argues that the Landmarks Law involves an excessive degree of entanglement between church and state in violation of the establishment clause." 914 F.2d at 356 n.4. The court of appeals then observed that the district court had dismissed this argument on the basis "that the entanglement doctrine applies only to instances of government funding of religious organizations." *Id.* Apparently the court of appeals did not accept the district court's reasoning in that regard noting that in *Jimmy Swaggart Ministries v. Board of Equalization*, ___ U.S. ___, 110 S. Ct. 688 (1990), this Court considered an entanglement claim in the context of government taxation of the sale of religious materials by religious organizations.

The court of appeals nevertheless stated that in *Jimmy Swaggart* "[t]he Court found no constitutional violation, as the regulation imposed only routine administrative and recordkeeping obligations, involved no continuing surveillance of the organization, and did not inquire into the religious doctrine or motives of the organization." 914 F.2d at 356 n.4. The court then opined that "[t]hese same factors are of course largely true of the Landmarks Law," observing that "[t]he only scrutiny of the Church occurred in the proceedings for a certificate of appropriateness, and the matters scrutinized were exclusively financial and architectural." *Id.* The court concluded that "[t]his degree of interaction does not rise to the level of unconstitutional entanglement." *Id.*

It is difficult to understand how the Second Circuit could equate "the level of contact created by the administration of neutral tax laws," *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. at 699, with a situation contemplating litigation over the issue of whether the Church can or cannot continue to conduct its charitable activities or carry out its religious mission in its own existing facilities and whether the cost of repair and rehabilitation is beyond the financial means of the Church. In *Jimmy Swaggart* the claimed entanglement was indeed thin involving basically only accounting, but in this case under the Landmarks Law, much more than administrative recordkeeping is at stake.

The right of a church to be free from government intrusion into its internal affairs is not limited to government officials walking the halls of parochial schools to see how public funds are being used. Neither is it limited to matters of faith and doctrine. The Constitution requires "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathe-*

dral, 344 U.S. 94, 116 (1952). See also *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

The provision of the New York Landmarks Law giving a public agency and ultimately the courts authority to require a church to present "sufficient evidence" of whether it can any longer conduct its own charitable activities or carry out its religious mission in its existing facilities is a far cry from *Swaggart*. The New York Landmarks Law which permits an administrative agency, and ultimately the court, to determine whether the cost of repair and rehabilitation of a church facility is beyond the means of the church is nowhere close to the factual situation in *Swaggart*.

This requirements of the Landmarks Law, in fact, guarantee the type of entangling contact between church and state which this Court found to be constitutionally offensive in *New York v. Cathedral Academy*, 434 U.S. 125 (1977). In that case this Court determined that a statutory requirement whereby the New York Court of Claims was required to review in detail expenditures for which reimbursement was being claimed by a parochial school in order to assure that state funds were not given for sectarian activities was itself unconstitutional, stating:

But even if such an audit were contemplated, we agree with the appellant that this sort of detailed inquiry into the subtle implications of in-class examinations and other teaching activities would itself constitute a significant encroachment on the protections of the First and Fourteenth Amendments.

Id. at 132.

In pointed contrast to what the Second Circuit said in this case, in *Cathedral Academy* this Court then stated:

The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will happen only once.

Id. at 133.

The court of appeals in this case noted that the Church had contended that its financial condition did not allow it to make the necessary improvements and to continue its programs but observed that the district court had "found that appellant had failed adequately to prove this assertion." 914 F.2d at 359. The court below, however, completely missed the point that for a church to be compelled to go before an administrative agency or a court of law to prove its financial condition or its ability to continue its ministry is exactly the type of entanglement which cannot be constitutionally countenanced.

The First Circuit Court of Appeals, for example, found that a government commission investigating the cost of private education violated both of the Religion Clauses when it included religious schools in its investigation. *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979). The court there stated that "in the sensitive area of First Amendment religious freedoms, *the burden is upon the state* to show that implementation of a regulatory scheme will not ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance." *Id.* at 75-76 (first emphasis supplied; second emphasis in original). In *Surinach* the court, after reviewing *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Walz v. Tax Commission*, 397 U.S. 664, 667 (1970), stated:

Accordingly we believe that the constitutional perils of the compelled disclosure of cost information must be assessed and the Commonwealth's interest in that disclosure justified in view of the purpose for which the information was solicited.

Id. at 76. The court in *Surinach* noted that even though at that point in time there had not been a showing of any purpose to inhibit religion, the effect of the Commonwealth's actions "constitutes a palpable threat of state interference with the internal policies and beliefs of these church related schools." *Id.* at 76-77. Pertinent to this case is the concern expressed in *Surinach* that "the value judgments and senses of priorities" of the church and government were "likely to be grounded in wholly different concerns." *Id.* at 77. The court also expressed its concern about church decisions being ultimately subject to public hearings during which there would be a required "disclosure of the schools' finances" requiring disclosure of amounts of donations and details as to expenditures. The court found that "[s]uch an entanglement between the affairs of church and state is 'an independent evil against which the Religion Clauses were intended to protect.'" *Id.* at 78.

The *Surinach* court also was troubled by a governmental program that requires the state to distinguish between, and thus determine, what is religious and what is secular. *Id.* at 78. The very process which St. Bartholomew's was required to follow in order to expand and modernize its own facilities for its ministry in essence subjects it to an administrative, and later judicial, determination involving exactly such a fact-finding process. Proof of whether the Church could carry out its religious mission in its existing facilities by necessity includes administrative conclusions as to what in fact is a church's religious mission. This is a process not suitable for governmental discussion or determination. Rather, it is exactly what only the Church itself can in our constitutional form of government decide.

In *Lemon v. Kurtzman*, 403 U.S. at 614, this Court called for the close scrutiny of the degree of entanglement when there is state involvement with religious institutions. Specifically it was stated that "the objective is to prevent, as far as

possible, the intrusion of either into the precincts of the other." In *Lemon* the Court indicated that one need not prove that a government requirement creates excessive entanglement but rather only that there is a reasonable likelihood or probability of entanglement. *Id.* at 602. In a subsequent case this Court spoke of the "substantial risk" of potential church-state conflict. *Levitt v. Committee for Public Education*, 413 U.S. 472, 479-81, (1973).

In *Allen v. Morton*, 459 F.2d 65 (D.C. Cir. 1973), that court noted that government involvement with religion should be kept to a necessary minimum, and not only actual interference but the "potential for an appearance of interference with religion," should be avoided. *Id.* at 75.

This Court in *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), stated that it will "not tolerate either governmentally established religion or governmental interference with religion." In *Walz* this Court recognized the importance of chartering a judicial course "that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Id.* at 672. This Court in *Walz* further emphasized the necessity of clearly examining governmental actions to ascertain if the government thereby becomes excessively involved in the affairs of the church.

Instead of deciding how a church may utilize its admittedly sacred property, a court should heed the advice of Justice O'Connor who warned in her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984), that government can run afoul of the Establishment Clause by "excessive entanglement with religious institutions, which may interfere with the independence of the institutions." St. Bartholomew's Church and its parishioners have experienced just such interference. It is this interference that cannot be tolerated under our system of government.

Contrary to both the trial court's and Second Circuit's conclusions, it is the Church and its members that must determine how to allocate the financial resources of that Church. It is not the function of government to determine how church funds dedicated to a religious ministry should be employed. For government, whether it be the executive branch or judicial branch, to determine how church funds will be spent constitutes governmental imposition of its secular values on a religious institution.

The very thought of a court, be it state or federal, utilizing its civil authority to require a church to prove and quantify the extent of hardship it would suffer to utilize its funds in a way demanded by the state with the necessary inquiry into the spending and finances of the church strikes at the very heart of the separation required by the non-Establishment Clause of the First Amendment.

As government is prohibited from contributing three pence of tax funds to a church, it is equally abhorrent for government to dictate how three pence of a church's treasury will be utilized by a church in the carrying out of its religious ministry. The day that a court has the authority to decide how even three pennies of a church's funds will be spent in its internal operations is the last day of true freedom for the churches of this country.

II. THE LANDMARKS LAW ON ITS FACE, AND AS IMPLEMENTED AND APPLIED, VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The court of appeals concluded that this Court's decision in *Employment Division, Dep't of Human Resources of Oregon v. Smith*, ___ U.S. ___, 110 S. Ct. 1595 (1990), rehearing denied, 110 S. Ct. 2605 (1990), has foreclosed St. Bartholomew's free exercise attack on the Landmarks Law.

This case can be differentiated from *Employment Division v. Smith* because this case does not involve actions contrary to socially harmful conduct. The majority decision in *Employment Division v. Smith* indicated several times that it was considering what was essentially criminal conduct. See *Smith*, 110 S. Ct. at 1599 and 1602. This Court stated that "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." *Id.* at 1603. This amicus would urge this Court to find that this case is one that is beyond the unemployment compensation field and outside the bounds of generally applicable criminal law and thus open to application of traditional free exercise law as developed under *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).¹ Also, St. Bartholomew's in conducting its religious services, is not engaged in "socially harmful conduct," as this Court noted was the case in *Employment Division v. Smith*, 110 S. Ct. at 1603.

This case can be differentiated from *Employment Division v. Smith* because St. Bartholomew's Church has raised more than "just" free exercise issues. It has implicated several other First Amendment rights, including its rights of assembly and association as well as the Taking Clause of the Fifth Amendment. The goal of St. Bartholomew's is to better utilize its own facilities to carry out its religious mission, thus fulfilling this

¹ The decision in *Employment Division v. Smith*, ____ U.S. ____, 110 S. Ct. 1595 (1990), has created ambiguity in the free exercise jurisprudence of this nation. This case provides the opportunity for this Court to clarify the impact of the Free Exercise Clause on government action which burdens a church's religious mission. At the very least, this Court could clearly state that *Smith* is confined to "an across-the-board criminal prohibition on a particular form of conduct." This case does not fall within such a prohibition.

Court's new requirement that the facts of a case present a "hybrid situation." 110 S. Ct. at 1602.

This case also can be differentiated from *Employment Division v. Smith* because the New York Landmarks Law is a law that lends "itself to individualized governmental assessment of the reasons for the relevant conduct." 110 S. Ct. at 1603. St. Bartholomew's is a landmark precisely because it is unique. The whole purpose of the statute in question is to deal with situations on a landmark-by-landmark basis. This case does not involve a statute that applies "across-the-board," without consideration to differences in historic properties. This case involves a statute being applied to a unique building on a one-of-a-kind basis. Amicus suggests there can be no better example of a case that lends "itself to individualized governmental assessment of the reasons for the relevant conduct."

Smith only limited the use of the "compelling interest" test of *Sherbert v. Verner*, 374 U.S. 398 (1963); it did not address the other aspects of the *Sherbert* analysis which places upon government the burden of demonstrating that there are no less restrictive alternatives by which government may accomplish its valid and legitimate objectives. *Smith*, 110 S. Ct. at 1604-05. The "no alternative means" requirement articulated in the free exercise test set forth in *Sherbert* predates *Sherbert* and may be found in our free exercise jurisprudence at least as early as *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). Apparently, neither the administrative agency nor the courts below in this case gave any consideration to other alternative means by which the City could have accomplished its aesthetic purposes without excessive entanglement between church and state, such as permitting the use of an affidavit claiming "religious hardship" in the place of a quasi-judicial proceeding to determine "hardship." The City also was not, under the Landmarks Law, required to prove, as it should

have been, that there were no alternative means for the City to accomplish the objectives of the Landmarks Law.

In *Pillar of Fire v. Denver Urban Renewal Authority*, 509 P.2d 1250 (Colo. 1973), the Supreme Court of Colorado was confronted with a church's challenge to the "Urban Renewal Authority's decision to condemn [its church] on the ground that the free exercise of religion was threatened and impaired by the condemnation proceeding." *Id.* at 1252. In addressing that challenge, the Colorado Court stated:

We, of course, recognize the extraordinary importance of the rights and freedoms engraved in the foundation of our country by the First Amendment of the Bill of Rights. Of all freedoms, freedom of worship may be the most precious to the spirit. Moreover, we all recall that our country was founded in large part by men and women who emigrated from lands where their form of worship was persecuted. Authority need not be cited to prove that the right to free exercise of religion is still vital in today's constitutional law.

Id.

The Colorado Supreme Court later extended the above free exercise reasoning in *Order of Friars Minor v. Denver Urban Renewal Authority*, 526 P.2d 804 (Colo. 1974). That case concerned the condemnation of nothing quite as sacred as the church itself but rather of a parking lot adjacent to the church. The church in that case claimed that "the lot is necessary to its operation, as it would impose a great difficulty upon many parishioners to attend were parking not available." *Id.* at 805. The Colorado Supreme Court, finding the case to be analogous to the situation in *Pillar of Fire*, vacated the trial court's order of immediate possession, and directed the court to hold a further hearing consistent with the findings in *Pillar of Fire* that the church was "entitled to a hearing at which the competing interests of the Renewal Authority and the church can be

weighed." *Id.* The court further observed: "Only after such a hearing and upon finding that there is a substantial public interest involved *which cannot be accomplished through any other reasonable means*' can the court proceed with the condemnation of the property." *Id.* (emphasis supplied).

In another eminent domain case, *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 871 (2d Cir. 1988), the Second Circuit (the appellate court here) considered the application of *Lyng v. Northwest Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988). In *Yonkers* the city had argued that *Lyng* held that the Free Exercise Clause does not prohibit governmental action that would substantially interfere with the practice of religion so long as the government's action is not actually coercive or penal in nature. However, the Second Circuit in *Yonkers* disagreed with the city stating, "[t]he *Lyng* Court declined to determine the 'exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs. . . .'" *Id.* The court of appeals then concluded that "[t]he Supreme Court merely held that 'whatever' the effect completion of the roadway might have on traditional Indian religious practices, the government could not be denied use of its own land," *id.*, and concluded that *Lyng* was distinguishable because "the government's use of its property involves significantly different considerations than the taking by the government of privately-owned religious property." *Id.* Likewise, this case involves action by government which restricts the Church's use of its own property.

The court of appeals here agreed with the district court that the Church failed to prove that it cannot continue its religious practice in its existing facilities. We believe, however, that under the free exercise analysis, which this Court has utilized over the years, when governmental action has imposed a substantial burden on religious practices, the government

must carry the burden of demonstrating that there are no other reasonable means to meet the government's primary objective. The district and circuit courts' analyses have turned this free exercise concept on its head placing the burden on the Church to prove there are no alternatives for it to accomplish its mission other than by altering the Church structure.

CONCLUSION

For the foregoing reasons, this amicus curiae respectfully requests that the petition for a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: February 1, 1991

Respectfully submitted,

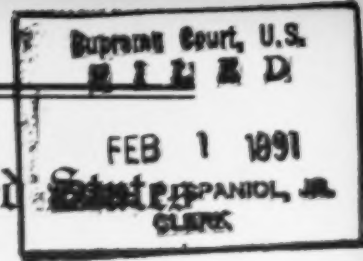
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990



THE RECTOR, WARDENS AND MEMBERS OF THE
VESTRY OF ST. BARTHOLOMEW'S CHURCH,

Petitioner,

— against —

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PRESERVATION COMMISSION OF THE CITY OF
NEW YORK,

Respondents.

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Court of Appeals for the Second Circuit

**BRIEF OF AMICI CURIAE THE PROTESTANT
EPISCOPAL CHURCH IN THE UNITED STATES
OF AMERICA AND EDMOND LEE BROWNING,
PRESIDING BISHOP, AND RICHARD FRANK
GREIN, BISHOP, EPISCOPAL DIOCESE OF NEW
YORK, AND THE DOMESTIC AND FOREIGN
MISSIONARY SOCIETY OF THE PROTESTANT
EPISCOPAL CHURCH IN THE UNITED STATES
OF AMERICA, IN SUPPORT OF THE PETITION
FOR WRIT OF CERTIORARI**

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No. 90-900

IN THE
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OCTOBER TERM, 1990

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— against —

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WRIT OF CERTIORARI**

INTEREST OF THE AMICI

The Protestant Episcopal Church in the United States of America (the "Protestant Episcopal Church") is a hierarchical ecclesiastical community with a polity expressed in its

Constitution, adopted in 1789 and subsequently expanded and amended by Canons.

The Protestant Episcopal Church has a body of members and communicants of over three million. Its Chief Pastor and Primate is the Presiding Bishop, The Most Reverend Edmond Lee Browning. It includes 99 domestic Dioceses and many overseas Dioceses and Missions. Two domestic Dioceses (the Episcopal Diocese of New York and the Episcopal Diocese of Long Island) include Parishes containing church buildings that have been designated as landmarks pursuant to the New York City local law in issue in this case (New York City Admin. Code §§ 25-301 *et seq.*, the "Landmarks Law"). St. Bartholomew's Church, the petitioner, is one of the Parishes of the Episcopal Diocese of New York. The Right Reverend Richard Frank Grein is the Bishop of that Diocese.

The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America (the "Missionary Society") is a non-stock corporation incorporated by special act of the New York State Legislature (Chapter 31 of the Laws of 1846). It is the corporate body through which the members of the Protestant Episcopal Church conduct and support missionary activities in this country and throughout the world. Canon 3, which establishes the Constitution of the Missionary Society, provides that it shall be considered as comprising all persons who are members of the Protestant Episcopal Church.

Every three years, the General Convention, the governing body of the Protestant Episcopal Church, adopts a budget for the administration of the Protestant Episcopal Church, the Missionary Society, and other related activities, together with a plan of apportionment allocating to each Diocese a part of the required funds. Similarly, each Diocese obtains, by periodic assessment upon its constituent Parishes, the necessary funds for the budget of the Diocese and for the Diocese's share of the amount apportioned to it by the General Convention. Virtually all regular income of the Protestant Episcopal Church, its Dioceses and the Missionary Society is obtained in that manner from the Parishes, including St. Bartholomew's.

As of 1986, the year in which this action was commenced, approximately 600 structures had been designated as landmarks by the Landmarks Preservation Commission of the City of New York (the "Commission"), of which 95 were religious buildings. Since many church edifices of the Protestant Episcopal Church date to the last century and beyond, it has been singularly "favored" with landmarking by the Commission; 31 of the 95 landmarked church buildings being those of the Protestant Episcopal Church.

Whenever landmark legislation is applied to the property of a Parish in a manner that, as the Court of Appeals found here, "drastically restrict[s the Parish's] ability to raise revenues to carry out its various charitable and ministerial programs," 914 F.2d at 355, funds available to the Diocese in which it is situate, the Missionary Society and the Protestant Episcopal Church as a whole are reduced and all are thereby burdened in carrying out their religious mission.

At the hearings before the Commission, the Right Reverend Paul Moore, Jr., then Bishop of the Episcopal Diocese of New York, described the religious mission of the Protestant Episcopal Church and its Dioceses, and their dependency upon Parishes such as St. Bartholomew's for the financial means to fulfill that mission:

... [T]he basic unit of the Episcopal Church is the diocese. For us to carry on our ministry to the poor, the financial viability of our large city parishes is essential. This mission to the poor is at the heart of the practice of our faith.

* * *

Under our polity all the churches and institutions of our diocese which serve the poor are dependent on churches like St. Bartholomew's. Denying a hardship petition today would be the denial of our right as Christians to carry out the very heart of our mission.

By limiting the mission and programs of a Parish with a landmarked building to those which can be carried out in its existing

facilities, the Landmarks Law and other similar laws drastically restrict the ability of the Protestant Episcopal Church, acting through its Parishes, Dioceses and the Missionary Society, to expand, to adapt to changes in the Parishes and the society in which they are located, and to set priorities dictated by religious mission rather than the facades of church buildings.

STATEMENT OF THE CASE

In 1967, the Community House of St. Bartholomew's, together with the much more significant church building adjacent thereto, was declared a "landmark" by the Commission. In 1983, St. Bartholomew's applied for permission to replace the Community House with a 59-story building containing new and enlarged facilities for the use of the Parish as well as office space that would produce needed revenue for support of Parish activities. The application was denied as an "inappropriate" alteration.

A second application, which scaled down the proposed structure to 47 stories and altered its design to more closely conform to the church and other surrounding buildings was also denied as "inappropriate." A third application, based on financial hardship resulting in the Parish's inability to carry out its religious and social programs in and from the outmoded Community House and at the same time maintain its buildings as required by the Landmarks Law, was also denied.

In 1986 St. Bartholomew's sued the Commission and the City of New York, claiming that the Landmarks Law and the actions of the Commission thereunder violated the First and Fifth Amendments. The action was dismissed by the District Court¹ and the Court of Appeals affirmed.² St. Bartholomew's filed a petition for certiorari with this Court on December 10, 1990.

Both the District Court and the Court of Appeals held that this Court's precedents place upon St. Bartholomew's the burden

¹ 728 F. Supp. 958 (S.D.N.Y. 1989)

² 914 F.2d 348 (2d Cir. 1990)

of proving that "the landmark regulation prevented the Church from carrying out its religious and charitable mission in its existing buildings," 914 F.2d at 351, and that burden had not been met.

With respect to the claim that the Landmarks Law unconstitutionally burdens the free exercise of religion, the Court of Appeals conceded that the law "substantially limits the options of the Church to raise revenue for purposes of expanding religious charitable activities," *id.* at 354 and that, "[i]t is obvious that the Landmarks Law has drastically restricted the Church's ability to raise revenues to carry out its various charitable and ministerial programs." *Id.* at 355. The court nevertheless concluded that no First Amendment violation existed since St. Bartholomew's had not proven its "inability to carry out its religious mission in its existing facilities," *Id.*

With respect to the claim that the Landmarks Law worked an unconstitutional taking of private property, the court conceded that "the regulation may 'freeze' the Church's property in its existing use and prevent the Church from expanding or altering its activities," but concluded that this Court's decision in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), "expressly permits" that result. It found that a violation of the Fifth Amendment could be established only by a showing by St. Bartholomew's that the Landmarks Law "impairs the continued operation of the property in its *originally expected use*." 914 F.2d at 356 (emphasis added).

Amici submit this brief in support of the petition of St. Bartholomew's Church because of their concern that the Landmarks Law, as applied by the Commission and the courts below, seriously impairs the freedom of the Protestant Episcopal Church, its Dioceses, Parishes and members to carry out their religious mission. The amici also believe and assert that the Landmarks Law requirements as applied by the Commission and sanctioned by the courts below constitute a substantial taking of private church property without compensation. Because that taking unduly burdens the Protestant Episcopal Church and its members in carrying out the Church's mission and is not justified by any compelling state interest, this Court should grant review.

REASONS FOR GRANTING THE WRIT

1. This Court has consistently prohibited government action that unjustifiably burdens the free exercise of religion. Religious beliefs are protected absolutely. Religious conduct is also protected — otherwise the very idea of religious “mission” would be illusory. Protection of religious conduct is, however, qualified where the state can demonstrate a compelling interest in public health or safety that cannot be served by less restrictive regulation. The decision below reverses that burden of proof, requiring a church to justify to a secular agency its religious mission and its activities in pursuit thereof.

2. Preservation statutes are, by definition, static. They attempt to preserve a “slice of time” in the form of the exterior facades of buildings thought to possess historical or architectural significance. They do so by imposing an “aesthetic servitude” on state-designated, privately-owned structures. They prohibit any alteration without state permission and often enforce that limitation by threat of criminal sanctions. The means and methods of carrying out a religious mission in the world, on the other hand, are dynamic. The decision below authorizes landmark commissions to apply secular standards to evaluate the “validity” of a church’s definition of the proper religious activities that comprise its mission and to decide whether the church’s property can be used to generate the resources needed to carry out those activities.

3. The court below has expanded this Court’s decision in *Employment Division v. Smith* in a manner that threatens all religious bodies that possess buildings of arguable significance. Review should be granted to make clear that a statute that selectively imposes a costly and burdensome servitude on private religious property without compensation is not within the ambit contemplated by *Smith*.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY PROHIBITED UNJUSTIFIED GOVERNMENTAL INTERFERENCE WITH AN INDIVIDUAL'S CONSTITUTIONALLY-GUARANTEED RIGHT OF FREE EXERCISE OF RELIGION

A. The Free Exercise of Religion Is A Fundamental Right.

The first words of the First Amendment³ manifest the resolve of the framers to protect freedom of conscience and exercise of religious beliefs. Indeed, the order of the freedoms enumerated in the First Amendment is itself significant:

The framers put freedom of conscience first, and then moved on to freedom of speech and the press. They were concerned above all else with spiritual liberty: freedom to think, to believe, and to worship.⁴

This Court has long recognized the free exercise of religion to be a fundamental right. "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment. . ." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). In *West Virginia State Board of Education v. Barnette*, the Court stated:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty,

³ Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

U.S. Const., Amend. I.

⁴ A. Cox, *Freedom of Expression* 1 (1982).

and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

319 U.S. 624, 638 (1943).

Writing for the Court in *Yoder*, Chief Justice Burger summarized the unique stature of the Free Exercise Clause, noting that “[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” 406 U.S. at 215.⁵

B. The Scope of This Right Includes Religious-Motivated Conduct.

Notwithstanding this Court’s and the nation’s heritage of commitment to preserving religious liberty, our charter of government provides no definition of “religion,” or description of what activities constitute its “free exercise.” This is for the best. Some religious beliefs and many religious organizations have experienced changes and will continue to do so. The lack of a Constitutional definition has given courts flexibility to deal with emerging religions and previously unforeseen challenges confronting established churches.

The First Amendment’s carefully chosen words expressly extend Constitutional protection to the free *exercise* of religion, not merely to the personal contemplation of religious principles. The holding of sincere religious beliefs and the exercise of those beliefs are inseparable:

This constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand,

⁵ See also *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (“When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. [T]he right to exercise the liberties safeguarded by the First Amendment ‘lies at the foundation of free government by free men,’” quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)).

it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts - freedom to believe and freedom to act.

Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

In *Yoder*, this Court recognized that governmental restriction of some types of individual conduct, while ostensibly applied "uniformly to all citizens of the State and [which did] not, on its face, discriminate against religions or a particular religion," can unconstitutionally interfere with free exercise of religion. Acknowledging that a state law criminalizing the refusal of Amish parents to send their children to school after the eighth grade only indirectly impacted upon religious beliefs, the Court nonetheless found that the law unconstitutionally interfered with the free exercise of religion, stating:

This case. . . does not become easier because respondents were convicted for their "actions" in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments [citation omitted].

Yoder, 406 U.S. at 220.

Recently, Justice O'Connor noted, "the 'free exercise' of religion often, if not invariably, requires the performance of (or abstention from) certain acts." *Employment Division v. Smith*, 494 U.S.____, 108 L.Ed.2d 876, 895 (1990) (O'Connor, J., concurring) (emphasis in original). Moreover:

Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the

belief itself, must therefore be at least presumptively protected by the Free Exercise Clause.

Id.

Included within the religious-motivated conduct entitled to Constitutional protection is the raising of funds by a religious organization for its own use. In *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943), this Court recognized that “[i]t is plain that a religious organization needs funds to remain a going concern.” There, members of the Jehovah’s Witnesses had distributed religious literature door to door and solicited individuals to “purchase” religious books and pamphlets in violation of a local ordinance, neutral on its face, which prohibited such activities without a license. Rejecting the suggestion that fund-raising for a religious organization constituted mere secular or commercial activity, this Court held:

[T]he mere fact that the religious literature is “sold” by itinerant preachers rather than “donated” does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project.

So, too, does an Episcopal Parish not become a secular, commercial real estate developer by seeking to make use of its own property to support the maintenance of its religious and charitable activities and to satisfy its financial obligations. Nor does the religious motivation disappear and the conduct become “secular” when a Parish seeks to fund an expansion of its ministry to the poor in accordance with its beliefs as to the nature and scope of its mission and the changing needs of its community. Nor does a church lose the protection of the Constitution when it seeks additional income from its own property for its survival. Church property constitutes a storehouse of value laid up by generations of members. For many, if not most, churches, their real property is their only substantial asset. To brand a church’s development of its own property for such purposes as nothing

more than "secular activity" is to say that "the passing of the collection plate in church . . . [is] a commercial project."⁶

We acknowledge, as has this Court, that "religious groups . . . are [not] free from all financial burdens of government." *Murdock*, 319 U.S. at 112. See also *Cantwell*, *supra* at 304; *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878). We further recognize that "[t]o say that a person's right to free exercise has been burdened . . . does not mean that he has an absolute right to engage in the conduct." *Smith*, *supra*, 108 L.Ed.2d at 896 (O'Connor, J., concurring). However, applying the precedents of this Court, for a municipality by means of a landmark ordinance to assume control of a religious organization's fund-raising and spending priorities (particularly where, as here, the church's proposed use violates no zoning or other generally applicable restriction) constitutes an infringement of a church's autonomy in its religious affairs and an impermissible burden on the free exercise of religion.

II. LANDMARK DESIGNATIONS OF CHURCH PROPERTY IMPOSE IMPERMISSIBLE BURDENS ON THE FREE EXERCISE OF RELIGION

Neither church organizations nor the property they own exist separate from secular society. Many regulations concerning design, use and maintenance protect public health and safety

⁶ The New York Court of Appeals has interpreted the free exercise clause so narrowly that any plan to modify or develop church property is viewed as "secular" and separable from the members' exercise of religious beliefs. In *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922 (1980), a religious society proposed to demolish one of its structures which had been landmarked and replace it with an office building, using the rental income to fund its religious activities. The Court of Appeals rejected the Society's free exercise claim in a single paragraph, concluding that the proposed construction involved "purely secular matters" not entitled to Constitutional protection. *Id.* at 456, 415 N.E.2d at 926. That decision conflicts with the recent decision of the Supreme Court of Washington in *First Covenant Church of Seattle v. City of Seattle*, 114 Wash.2d 392, 787 P.2d 1352 (1990), in which the court specifically addressed the First Amendment issues and found the designation of church property as a "landmark" under a similar ordinance to be a violation of the free exercise clause of the First Amendment. This inconsistency of state courts emphasizes the confusion that exists in applying this Court's precedents and the need for review.

and mutually benefit churches, their members and the entire community. Such regulations rarely interfere with church autonomy or prevent or restrict activities of church members in pursuit of religious mission. Landmark designations of church property, however, are not in this category.

Generally, landmark preservation ordinances empower local agencies to regulate the manner in which buildings designated by them may be modified, the circumstances under which they may be demolished and the standards to which they must be maintained. These ordinances have become pervasive throughout the United States.⁷

Designation of a church building as a landmark imposes severe restrictions on its congregation's exercise of religion. First, by requiring that the church maintain the condition of the building to meet aesthetic standards, it invades the church's autonomy by diverting scarce funds from other uses which have been deemed by its congregation to have a higher priority under its system of religious beliefs. Second, it imposes significant and chilling administrative and legal expenses on the church should it seek through a "hardship" exception, if one is available, to modify or replace its existing structures to fund an alteration or expansion of its religious activities. Third, it substantially limits the church's ability to plan for its future, a particularly heavy burden for urban congregations for whom real property is the principal or only potential source of additional income. Finally, landmark designation undeniably causes an immediate and drastic reduction in the value of church property. In the case of St. Bartholomew's, that reduction was calculated to be \$140,000,000, a loss of 80 percent of the property's value absent the landmark "servitude." In the case of the First Covenant Church of Seattle, designation reduced the church property's value from \$700,000 to \$400,000, approximately 43 percent. *First Covenant Church*, 787 P.2d 1352, 1355 (Wash. 1990).

⁷ As of July, 1989, landmark preservation ordinances were in effect in 360 cities, municipalities and counties, covering portions of 47 states. National Center for Preservation Law, *Historic Preservation Ordinances List*, July 8, 1989.

The negative effect of such uncompensated takings from churches, which must otherwise rely on voluntary member contributions to support their needs, is profound. Perhaps even more tragically, it is our urban churches with their dwindling congregations and ever-increasing role as the last resort for aid to the urban poor that suffer most often.

The sum of the effects of landmark ordinances is to burden the exercise of the central element of every religious organization — the fulfillment of its religious mission. A congregation's mission is the central expression of its belief system. For Episcopal churches, both worship and ministry in the community are inseparable parts of their mission.⁸

While the elements of a church's mission never change, the needs of the community and the level of resources required to minister to those needs have changed in ways that could not have been anticipated when St. Bartholomew's and other "historic" church buildings were constructed. To pursue their role in a changing world, churches cannot remain static. Yet conditioning any alteration of church property upon the satisfaction of onerously expensive, government-imposed secular burdens⁹ inevitably "freezes" the church's mission in the mold of its "current buildings," preventing the church "from expanding or altering its activities." 914 F.2d at 356.

⁸ "Each Church, therefore, seeks to be faithful to God both by its services of worship and, according to its own sense of vocation, by reaching out beyond its doors in ministry. Churches proclaim the Word and Ministry of God through preaching, prayer, and sacraments and through special ministries such as music, education, social concern and outreach services to the spiritual and physical needs of the communities in which they are located and often far beyond." *Theology for the Ministry of St. Bartholomew's Church*. N.Y. Times, June 28, 1981, § 4 at p. 22E.

⁹ In *Jimmy Swaggart Ministries v. Board of Equalization*, ___ U.S. ___, 107 L.Ed.2d 796 (1990), although this Court held that an incremental and generally applicable sales and use tax did not impose a constitutionally significant burden, it recognized that "a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices." *Id.* at 811. A landmark designation, while not "generally applicable," works the same effect as the onerous tax postulated by the Court in *Swaggart*.

That burden cannot be excused because landmark ordinances arguably impact only indirectly on religious beliefs by restricting the use of private property to generate funds for religious mission:

If the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect.

Braunfeld v. Brown, 366 U.S. 599, 607 (1961). "Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950).

III. THIS COURT'S DECISION IN *EMPLOYMENT DIVISION v. SMITH* DOES NOT PRECLUDE A DETERMINATION THAT LANDMARK ORDINANCES UNJUSTIFIABLY BURDEN THE FREE EXERCISE OF RELIGION

The precedents of this Court establish that once it has been shown that a regulation burdens the free exercise of religion, government must demonstrate that application of the regulation to a religious organization "is essential to accomplish an overriding governmental interest." *United States v. Lee*, 455 U.S. 252, 257-58 (1982). See *Jimmy Swaggart Ministries, supra*, 107 L.Ed.2d 796 (1990); *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

In *Employment Division v. Smith*, 494 U.S._____, 108 L.Ed.2d 876 (1990), however, this Court held that the compelling interest test would not be applied to a generally applicable, religion-neutral criminal law burdening an unusual religious practice—the sacramental use of peyote. For the following reasons this Court should grant the petition and confirm that its holding in *Smith* is inapplicable to cases concerning landmark ordinances, thereby

preserving the application of the compelling state interest test and government's burden of proof in this and similar cases.

A. The "General Applicability" Requirement of Smith is Not Satisfied.

In *Smith*, the statute at issue was a criminal prohibition against the use of controlled substances. Clearly, that statute was "generally applicable," in the ordinary sense that it applied to each and every individual within the state's jurisdiction, without exception or procedures for discretionary application. Landmark ordinances like New York's are not in that category. By definition, landmark ordinances and their restrictions apply only to selectively designated structures. The qualifying characteristics for such designation are neither uniform nor definite. Frequently, such designations are initiated by private nomination. There are no requirements or even concerns that similar structures in different locations be landmarked.¹⁰

The court below was wrong in holding that the Landmarks Law is "generally applicable" because it applies to "[a]ny improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value." 914 F.2d at 354-55. Not only is the class described a small part of all buildings in the City, the Law does *not* apply until a building is formally selected as a Landmark by state action. A law need not, as the Court of Appeals believed, expressly discriminate against religious organizations to be of selective — not general — applicability.¹¹

¹⁰ See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (Rehnquist, J., dissenting) Of over one million buildings in New York City, only 600 had been singled out as landmarks by 1986. In addition to churches (95) a large percentage are public buildings. "[T]he ordinance is not limited to historic buildings and gives little guidance to the . . . Commission in its selection of landmark sites." *Id.* at 138, n. 1. The ordinance does not generally prohibit noxious uses of property, but imposes on a few owners *affirmative* duties which between private parties would be called a "servitude." *Id.* at 146.

¹¹ Nor does the fact that the Landmarks Law is not specifically aimed at religious structures mean that it is "neutral" in the Constitutional sense. "The fact that

(Continued on next page)

B. Landmark Ordinances Provide Mechanisms For Individualized Exemptions.

In *Smith*, the majority found that the *Sherbert* compelling state interest test was well-suited to cases involving unemployment insurance programs because those programs include "a mechanism for individualized exemptions." This reaffirmed the principle stated in *Bowen v. Roy*, 476 U.S. 693, 708 (1986) that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S.____, 108 L.Ed.2d at 889. The economic hardship exception common to landmark ordinances, including New York's, provides a similar mechanism for individualized exemptions¹¹, with the burden of proof on the individual, not the state, yet no reference was made by the court below to that exemption as affecting general applicability.¹² Finally, New York's Court of Appeals has adopted a judicial test providing a non-statutory exemption mechanism for "charitable" organizations, including churches, albeit a test which gives virtually no weight to free exercise concerns, see *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 454-55, 415 N.E.2d 922, 925 (1980).

[an] ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance." *Murdock*, 319 U.S. at 115. Statutory blindness does not necessarily equate with constitutional neutrality. Manifestly, "laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." *Smith*, 108 L.Ed.2d at 900 (O'Connor, J., concurring).

¹¹ A 1977 amendment to the New York law also exempts the interiors of religious structures from landmark designation, a clear recognition that church buildings deserve special attention. Indeed, a Boston statute has recently been found to violate the Massachusetts State Constitution insofar as it prohibits alterations to the interior of a church. *The Society of Jesus v. Boston Landmarks Comm'n.*, No. S-5415, slip. op. (Mass. Dec. 31, 1990).

C. Landmark Designations Inherently Produce "Hybrid" Cases, Combining Free Exercise Claims With A Taking of Private Property.

Smith states that, "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously-motivated action," have been hybrid cases, *i.e.*, cases combining a free exercise claim with the assertion of another constitutional right. 494 U.S.____, 108 L.Ed.2d at 887. Cases concerning landmark designations of religious property necessarily involve a combination of Constitutionally-guaranteed rights; the right to free exercise of religion and the right of churches, as owners of private property, under the Fifth Amendment, to be free from a government taking of their property without just compensation.

The court below, and preservation advocates generally, attempt to justify landmark ordinances in terms of the governmental interest in "preserving structures and areas with special historic, architectural or cultural significance." 914 F.2d at 357, n. 6. That state interest was termed "permissible" in *Penn Central*, where no First Amendment claim was presented. Here, however, that interest must be balanced against a fundamental right.

Landmark laws assertedly benefit everyone by improving the general quality of life. The high cost, however, is not borne by taxpayers generally, but solely by a few owners of designated private properties. That cost may be bearable by a commercial owner who can realize a fair return from continuing to use the structure for its original purpose. For a church, however, unlike a railroad, making money is not a goal, but only a means to an end, the fulfillment of its self-defined religious mission. The ultimate impact of landmarking on a church is not merely financial. By diminishing the potential income from the property of the church, the stored value of contributions of members over past decades, the law restricts the ability of the church to grow and to alter and adapt its religious ministry to the changing community. By disregarding a church's own definition of its mission and forcing it to prove that its pursuit of that mission cannot be carried out in its existing buildings, the law freezes the religious

practices of a church in a mold cast decades or centuries earlier when its buildings were constructed.

In *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988), the majority of the Court found objectionable the creation of a "religious servitude" that would substantially interfere with the Federal government's use of its own land. Here the roles are reversed. The state, without compensating the property owner, has imposed an "aesthetic servitude" on private property which has substantially burdened the use of the property for religious purposes. Government is not entitled to both sides of the bargain. It cannot both preserve its own property from religious limitations that might burden it as owner and impose similar burdens on private property without making compensation for the loss of income to support the owner's religious mission.

D. Landmark Preservation Represents A Minimal And Subjective State Interest, Unlike Those Interests Found Sufficient By This Court To Override The Fundamental Right of Free Exercise of Religion.

The prior decisions of this Court raise, but do not confront or decide, the issue posed in this and other landmarking cases involving church property. In *Penn Central*, the City's interest in historical preservation was conceded to be a "permissible governmental goal." 438 U.S. at 129. Notably absent, however, was any claim that the taking of commercial property substantially burdened the exercise of a fundamental First Amendment right and any holding that the state interest is superior to that right.

Other lines of decisions have established that in First Amendment cases expressions of state interest will be viewed with skepticism and will prevail only when the interest is truly compelling. "[T]he government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means." *Bowen*, 476 U.S. at 727 (O'Connor, J., concurring and dissenting). *Sherbert* first applied the "compelling state interest" test and found that religiously motivated acts are subject to regulation where they "pose some substantial threat to public safety, peace or order." 374 U.S. at 403. *Cantwell* held

that "[c]onduct remains subject to regulation for the protection of society." 310 U.S. at 304, quoting *Reynolds v. United States*, 98 U.S. 145 (1878) and that, "... a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." 310 U.S. at 308.

On the other hand, this Court has found "compelling" governmental interests in the prohibition of possession and use of controlled substances, *Smith*, 494 U.S. __; the collection of income taxes, *Hernandez*, 490 U.S. 680; a comprehensive social security system, *Lee*, 455 U.S. at 258-59; and a military draft, *Gillette v. United States*, 401 U.S. 437 (1971).

The amici submit that a governmental desire to preserve structures of "special character" is commendable, but in sharp contrast to the compelling health, safety and national defense interests previously deemed sufficient to override the fundamental right of free exercise of religion. Landmark ordinances do not seek to protect the health or safety of the general public. Rather, they seek to protect an aesthetic ideal which is no more shared by the public as a whole than the precepts of any particular religion. Governmental judgments as to preservation and permissible alterations are necessarily subjective, undemocratic and demonstrably more mutable than the tenets of any established religion. Even if seen by some as "compelling," governmental interest in landmarks can be protected by narrower means than requiring a church to limit its activities to those that can be performed in existing structures or suffer criminal penalties.

For each of the above reasons, this Court should grant review to declare the holding in *Smith* inapplicable to the substantial limitations placed on private church property by the Landmarks Law. When landmark ordinances cover church properties, the Court's compelling state interest test should be applied by balancing the asserted state interest against the congregation's fundamental Constitutional right to define and carry out its religious mission free from government interference.

CONCLUSION

This Court has yet to decide a case in which a landmarks law like New York's has been applied to the property of a religious organization. The courts below and the state courts have decided such cases relying primarily upon "free exercise" and "takings" decisions in cases presenting facts fundamentally different from those here. Those decisions are inconsistent and, in some cases, in direct conflict.

Guidance from this Court is urgently needed to ensure that the religious beliefs and activities of our churches, not the stones and mortar of their meeting places, receive Constitutional protection. Church buildings were constructed by members of various faiths as seats for their religious mission, as determined by them, not to serve as congregation-funded architectural museums for the general public. As applied to the property of religious organizations, the dominant effect of landmark laws is to inhibit and substantially burden the free exercise of religion.

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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